

# INSURANCE REQUIREMENTS IN CONTRACTS

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## A Procedure Manual



**VERSION 7.0  
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## FOREWORD

The purpose of this manual is to serve as a guide in developing proper insurance requirements in contracts. This manual explains how to establish insurance requirements for most contracts, including those with contractors, professional service providers, tenants, vendors, and users of public property, and how to verify their compliance with those requirements during the term of the contract.

It should be noted, however, that risk management is more of an art than a science, and therefore, although this manual will provide guidance in 90% of the cases encountered by the user, there will also be exceptions to the rules contained herein. If the user encounters situations that fall outside of the manual's recommendations, the user should contact its insurance and legal advisors.

This edition has undergone extensive revisions to eliminate older insurance forms and to condense the material to make it easier for those without an insurance background to access and implement the recommendations. This includes a "basics" section that describes each element of the insurance requirements and provides a single set of specifications that can be used for most contracts. Instructions for the contractor and insurance agent or broker have also been included to make it easier for the contract administrator to request and receive the required coverage.

Another major change is the elimination of most of the customized forms for public agencies. One of the proposed techniques of earlier editions was to request that insurers execute certificates and endorsement forms provided by the public entity. The obvious benefit of this approach is that the public entity knows that it is receiving the coverage it is looking for if the exact endorsement is provided. However, because many insurance forms require prior approval by state regulators, many insurers refused to use custom entity-designed endorsements, and it is no longer practical to obtain them. Also, most of the terms of the insurance requirements have been incorporated within standard insurance forms, lessening the need to spell out specific requirements. The manual does provide a single-page sample endorsement for comparison with industry forms as well as samples of insurer endorsements that provide the recommended coverage.

Despite these improvements, the editors recommend that you use the specifications that spell out the form numbers and key terms described in this manual. Some insurers use custom policy documents, and we suggest that you compare the language in those documents to the specifications to verify that you are receiving the recommended coverage.

This manual contains sample standard Insurance Service Office (ISO) industry forms for reference. Occasionally, new editions of these forms are released. These new editions may broaden coverage, but they may also restrict coverage from the previous edition. An attempt is made in each successive version of this manual to include any updated forms, as well as comments on the changes made to old editions, and recommendations on which forms to use. Though a new edition is released, insurance companies may continue to use older editions of these forms. It is, therefore, important that the user check the edition date of the form supplied by contractors, tenants, vendors and users of public property, and/or their agents and brokers. The edition date can usually be found in the lower left-hand corner of the form, following the form number.

Non-insurance sections of the contract are also very important to the risk management process. Normally, the “Indemnification” and “Scope of Work” sections should be reviewed for unusual language or risky activities. If the contractor’s insurance does not meet the requirements under the contract, it is the contractor’s responsibility to obtain the necessary coverage to satisfy its agreement with your Entity.

Insurance is only one way that the contractor can fulfill its financial responsibilities to your Entity. There should also always be a section in the contract that states that the lack of insurance does not negate the contractor’s obligations under the contract. As Alliant is not a law firm, we recommend that users of this manual consult with its own insurance professionals or legal counsel for specific language for this section’s wording. Make sure your indemnity language is strong, and if the contractor does not carry sufficient or correct insurance to cover its obligations to your Entity, make certain it does have the assets to indemnify the Entity for those uninsured or underinsured areas of risk.

Finally, a section is included containing the most commonly asked questions from manual users over the years. We have included this section as a resource for the user, to illustrate that risk management is not always a simple process, and to encourage the user to contact its insurance advisor when encountering an “outside the box” situation.

## ACKNOWLEDGEMENTS

This manual originates from work performed in the late 1970’s by public entity risk managers and consultants, a time when the field of public entity risk management was beginning to come into its own. The editors want to acknowledge the work of Erin Oberly, a risk management consultant working with Frank James of the Redwood Empire Municipal Insurance Fund (REMIF), for the earliest versions of this manual. Many changes have occurred in the fields of risk management and insurance since its inception, and this manual has kept up with those changes due to the continued support and dedication of public entity risk managers and consultants, including David Born, David Clovis, and Joe Risser. This most recent revision has been edited by Marcus Beverly, CPCU, AIC, ARM-P, of Reasoned Risk Management, [www.reasonedrisk.com](http://www.reasonedrisk.com), with the support of Alliant Insurance Services. We would also like to thank Rhonda Combs, ARM, Risk Manager for this City of Monterey, for her professional review and contributions to the manual.

Most importantly, this manual represents the issues encountered by its users, and their feedback continues to be vital in keeping the material up-to-date and useful. We encourage you to contact your insurance or risk management consultant for advice as needed and send questions and suggestions for future editions of this manual to Marcus Beverly at [marcusbeverly@yahoo.com](mailto:marcusbeverly@yahoo.com), or to Dan Howell at [dhowell@alliantinsurance.com](mailto:dhowell@alliantinsurance.com).

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## FREQUENTLY ASKED QUESTIONS

The following questions represent those most often asked by users of this manual. If you have questions that are not answered by this section, please do not hesitate to contact your Alliant Account Administrator. As you can see by reviewing the following section, we all learn through the process of thoughtfully examining the risk management process.

***1. If a lessee or contractor is a large one, do I still need to insist on the insurance requirements?***

**Yes;** you normally have no way of verifying that their assets are sufficient for losses that might occur, whereas you could be confident in an insurance carrier with a quality A.M. Best Rating.

***2. Is it all right if the contractor alters the indemnification language?***

**No;** indemnification language is carefully worded to afford your Entity as much protection as legally possible, and usually the exact language has been tested in court. Altering the language would weaken your Entity's protection and should only be undertaken on advice of your legal counsel.

***3. Can we require an A.M. Best Rating for a company that is "admitted" in California, or is this against the law?***

**Yes;** unless the company is providing a surety bond. State law requires owners to accept surety bonds from any surety company, in an effort to improve small firm contractors' chances in successfully bidding a job. If it is a federally approved surety company, you are obligated to accept the surety company. This can be reviewed on the web at <http://www.fms.treas.gov/c570/index.html>

Remember, just because an insurance company is "admitted" does not ensure that they have the financial strength designation required by your contract.

***4. Why should we ask for property insurance on tenants improvements and betterments, instead of just adding them to our property insurance policy?***

Unless the lease specifically states that your Entity gains ownership of these improvements as soon as they are installed, your Entity has no insurable interest in them; and, therefore, you usually cannot insure them under your policy.

***5. If the contractor's insurance does not meet the criteria in our insurance requirement specifications, should we alter the requirements to fit the contractor's insurance?***

**No;** the insurance requirements language has been carefully worded to afford your Entity as much protection as possible, and it has been tested in court. Altering the language would usually weaken your Entity's protection. It is not the responsibility of your Entity to tailor your requirements to what the contractor has; rather, the contractor should procure insurance to meet your specifications and truly, you are doing the contractor a favor in showing it the proper coverage needed in order to protect its business.

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**6. Does the “edition date” on the suggested ISO endorsements matter?**

**Yes;** there have been significant reductions in the coverage afforded to additional insureds by “updated” versions of these endorsements. A further discussion regarding these changes is contained in the section of this manual describing endorsements.

**7. If the agent or broker changes the word “endeavor” to “will provide” in the notification section of the certificate of insurance, are we okay?**

**No;** Certificates of insurance DO NOT alter the insurance coverage, and any changes that are necessary need to be endorsed onto the policy with a copy of the endorsement provided to your Entity. Agents and brokers will sometimes try to convince you that endorsements are unnecessary when the certificate has its standard wording changed; if so, you need to point out the box in the upper right hand corner of the certificate, which states that it DOES NOT amend or alter the insurance.

To ensure that the burden is on the insurance company to notify you of a change in status of coverage, you must receive an endorsement to this effect. Being named as an “additional insured” obligates the insurer to inform you of any status change in the policy.

Prior editions of this manual have suggested requiring notice of cancellation or coverage changes with 30 day’s notice by USPS registered mail with a return receipt. This approach does not seem feasible in the current environment of electronic communications and express mail services. Moreover, some insurers refuse to take on this obligation and, in some states, the cancellation requirements are stronger. Many risk managers are now requiring that the contractor take on this responsibility. While this may be allowing the “fox to guard the henhouse”, mid-term cancellations and reductions of coverage are so rare as to make the value of this term less important. If a contract involves a risk so substantial that the risk of cancellation or coverage reduction is heightened, a project specific policy with the Entity as an Insured may be warranted.

NOTE: The latest edition of the standard certificate of insurance form now reads that “notice of cancellation will be provided in accordance with policy terms and conditions”.

**8. Can lower limits be permitted when we are dealing with small contractors or artisans, and we are only using them for small jobs?**

**Yes;** there are some very small vendors or artisans that may provide a service to your Entity and the cost of obtaining standard limits may not be possible. You should always evaluate the potential of loss, potential benefit to the organization for the service provided and finally, the vendor’s financial capacity to purchase coverage at reasonable rates. The dollar amount of an agreement would never be the sole determining factor on the insurance, however.

**9. The contractor’s agent says that we cannot get the endorsements as required by the Insurance Requirements in Contracts specifications; what can we do?**

In many instances, the agent or broker has not approached the insurance company with your request – the agent or broker is merely trying to discourage you from asking so that it will not have to bother. We recommend contacting the broker or agent directly. By informing the agent or broker of the needs and requirements of your Entity, he or she will typically provide

you with the necessary endorsements required by your Entity. If this tactic does not work, please call an insurance advisor for confirmation of the unavailability of endorsements from the contractor's company.

Note that some states, California among them, now require prior approval of all insurance policy and endorsement forms by the Department of Insurance. Therefore, use of custom endorsements may not be practical. In these situations, we recommend that the Entity work with its insurance advisor and the contractor to determine what forms are available to obtain the desired coverage.

**10. Do we need and additional insured endorsement on an automobile liability policy?**

An additional insured endorsement is no longer required on most business auto policies because the standard ISO forms now include coverage for "anyone who is liable for the conduct of an insured." Many times general and auto liability coverage are issued on a package policy and the additional insured endorsement can apply to all coverages.

**11. How do we determine the proper limits of liability for any given job?**

Ask yourself how much damage the contractor could cause if it completely mismanaged its work causing bodily injury and property damage to others. Include in your estimate, lost time, wages, extra expense incurred for repairing or replacing the work, and any future impacts. If this amount is more than the suggested amounts shown in the specifications in this manual, use the greater amount.

The editors have increased the standard requested limits of General Liability to \$5 million for contracts with construction risks and to \$2 million for other contracts. The Risk Manager will need to evaluate whether contracts require the suggested limits or a different amount. A major capital outlay project may require even higher limits. And, some smaller contracts such facilities use agreements may not merit \$2 million, and a lesser amount may suffice. We have not increased the amount of auto liability limits because the business auto policy does not have an annual aggregate which means that the Entity need not be concerned about depletion of limits by other additional insureds, however, a catastrophic loss may prove \$1 million of limits inadequate. A contract involving charter transportation could very well merit a \$5 million limit or higher.

**12. Can we accept an insurer with less than an A.M. Best Rating A: VII or Standard & Poor's BBB?**

**Yes;** but keep in mind that the rating gives your Entity some confidence in that insurer's ability to cover all of its claim liabilities, including your potential claim. By accepting lower A.M. Best or Standard & Poor's ratings, you are exposing your Entity to the possibility that the insurer will be unable to pay any claim you or a third party may present. As an aside, major insurance brokers and agents also insist on placing clients in companies with high A.M. Best and Standard & Poor's ratings, as a way of protecting themselves against potential E&O claims from their clients.

**13. How do we discover what the rating of an insurer is?**

A.M. Best ratings can be accessed over the internet for no cost at [www.ambest.com](http://www.ambest.com). Go to the "Member Center" of the website to register for access to the ratings.

You also can go to the Standard & Poor's website to obtain the rating of a specific insurance company. You must register for access, although this is free of charge. Go to [www.standardandpoors.com](http://www.standardandpoors.com) and look for a "Find a Rating" link in the margin or header.

***14. What do the A.M. Best or Standard & Poor's Ratings mean?***

See Chapter Two, page 25, for a discussion of this question. Simply, the Standard & Poor's or A.M. Best ratings give your Entity a sense of the financial strength of the insurance company that is insuring the contractor.

***15. Does a contractor need professional liability coverage?***

A contractor needs professional liability coverage if expected under contract to provide "professional" services. The simplest way to decide is to determine whether the nature of the services provided entail "brain work" or "physical work". If it is only physical work, then a liability policy, general and/or automobile will most likely cover all your exposures to loss. However, if the work or a portion of the work is expected to involve the use of professional knowledge, professional liability insurance is required. As an example, if a contractor is merely following blueprints in constructing a building, it would involve only physical work and a general liability policy will suffice. However, if the contractor is a "design-build" firm, or decides that it knows of a better way to construct part of the building, and it alters the blueprints accordingly, then it has crossed the line over into providing "professional" service and would then need professional liability coverage to cover a subsequent loss.

***16. How long of a period of time do we require the claims-made professional liability insurance to be carried after completion of the project?***

A "claims-made" coverage will only respond to a claim that is presented while the policy is in force or during an extended reporting provision. Therefore, it is imperative that your Entity be protected as long as possible after the completion of the project, so that any claims caused by faulty design or other professional services (see Question 14) will be covered by the responsible party. Keep in mind your regular liability policy will not cover professional liability losses, and therefore your contractor may be bare in the event of a claim arising out of professional services rendered on the project. Normally, professional liability policies can be purchased with a three year "tail" (reporting period), which will allow claims to be presented up to three years after the professional liability policy expires. If you can get a longer tail in your contract, do so.

***17. Does a contractor need proof of automobile liability when hired to work on the premises?***

**Yes;** for the simple reason that the contractor has to use some means of transportation to reach your premises, and to transport tools, supplies, and materials. If the contractor is determined to be engaged in business on your Entity's behalf when it is involved in an automobile accident, then your Entity may be held liable. Further, since owners of vehicles are required to carry insurance anyway, this requirement carries little burden to the contractor.

**18. *Should we ask to be named as an additional insured on the contractor's professional liability policy?***

No; the contractor's professional liability insurer will not comply with such a request. The reason is that the insurer does not want to pick up your Entity's professional liability hazards, which it would do if you were an additional insured. Professional liability policies are specifically underwritten based on the professional history of the contractor. A contractor's insurer is not interested in underwriting your Entity's professional risk, and therefore will not add your Entity as an insured on the contractor's policy.

**19. *What can be done if we don't have the proof of insurance when it is time to start the work?***

There is very little that can be done at this point in the process, which is why we recommend that the insurance specifications be sent out with the pre-bid package. There are no good choices when this situation occurs; either you must delay the work while you wait for the proof, or you must take some risk until the proof is received, and hope that the contractor's insurance meets your specifications.

**20. *Why can't we accept a certificate of insurance as proof of the Entity being named as an additional insured?***

In the upper right-hand corner of the ACORD Certificate of Insurance are the following words:

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policy below.

If any agent or broker tries to convince you that the certificate truly does confer rights or coverages, and that you therefore do not need the endorsements you are requesting (and some will) you can direct their attention to this statement.

**21. *Why do we need an indemnity clause in our contract when we are added as an additional insured on the liability policy?***

Insurance is only one way that the contractor can financially guarantee its liabilities. If you have an indemnity provision in your contract with the contractor, that contractor is obligated to indemnify your Entity whether or not its insurance covers the loss. This puts the burden on the contractor rather than your Entity to make certain that its coverage is sufficient and current. Therefore, make sure your indemnity language is strong, and that if the contractor does not carry sufficient or correct insurance to cover their obligations to your Entity, it does have the assets to indemnify those uninsured or underinsured exposures.

In fact, the written indemnity clause in the contract is the real trigger for coverage as your contract, under normal circumstances, is an "Insured Contract" as defined under the Commercial General Liability policy (CGL). The CGL confers automatic coverage for "Insured Contracts," but the Entity must have a written contract containing indemnity language in your favor prior to the loss in order to trigger coverage. As a result, the indemnity clause is crucial to trigger coverage.

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**22. Should we ask for a waiver of subrogation from the contractor's insurer?**

In the case of workers' compensation and property insurers **yes**; if your Entity does not do so, the contractor's insurance company can look to your Entity to reimburse any claims cost that they have incurred defending or indemnifying its insured on your project when there is contributory negligence by your entity in the loss. "Subrogation" is the transfer to the insurance company of the contractor's right to collect for damages from another party, in this case, your Entity.

In the case of liability insurers **no**; but this is true only if your Entity is named as an "additional insured" on the contractor's liability policy. Current case law holds that it is against public policy to allow an insurer to subrogate against its own insured, even an "additional insured." As long as your Entity is diligent in securing and confirming its additional insured status (by insisting on receiving a copy of the additional insured endorsement), there is no reason to require a waiver of subrogation on a liability policy.

*Editor's note: the phrase "waiver of subrogation" is no longer used in the ISO Commercial General Liability form, rather the phrase "Transfer of Rights of Recovery against Others to Us" is now used. While the editors normally favor using the current industry language rather than historical legal terms, in this case we believe "waiver of subrogation" remains the best way to communicate to contractors and the legal community the intent of the agreement.*

**23. If a hold harmless agreement is not necessarily legally binding, why do we need to include it?**

A hold harmless agreement usually does not relieve your Entity of legal liability for your Entity's own negligence, but it does relieve your Entity of legal obligations arising out of the contractor's negligence. Without the hold-harmless agreement, your Entity's ability to be protected by your additional insured status is weakened.

**24. Should we require bonds in contracts that are not construction related?**

**Yes**; there are a number of situations when your Entity may want to require bonds. You may want to consider bonds when dealing with certain types of vendors, such as vendors that provide personalized products such as customized information systems, those that supply specific equipment designed and built for your Entity or vendors that provide specific services for your Entity. Although bonds may not be required on all vendor agreements, it is important to understand how they may save your Entity in the event that the vendor fails to deliver or lacks the funding to finish its project.

**25. Should we require that contractors provide proof of terrorism coverage in their insurance programs?**

**Maybe**; the Federal Government has mandated that all insurers offer coverage for "terrorist acts" for an additional premium. Though this coverage is currently available, many insureds are declining it due to the additional cost. It is unclear to what extent a contractor could be responsible for any act of terrorism that occurs while performing tasks for your Entity. You may consider the coverage on construction projects which may be impacted as a result of a terrorist attack. As with any exposure, you must identify the potential for risk. If the project

is politically sensitive or considered highly visible, the inclusion of terrorism coverage may be necessary.

***26. What do I do if my contractor states that they are self-insured for liability, auto, and workers' compensation, and they cannot provide a certificate of insurance?***

In the State of California, organizations that are self-insured for **workers' compensation** must have a Certificate of Consent to Self-Insure issued by the State of California Department of Industrial Relations. They must also have authorization from the State to self-insure their auto exposure, but this is not the case for general liability. First, obtain copies of their documents granting them the authority to self-insure for workers compensation and automobile liability. Second, obtain a letter from the contractor that clearly states all of the requirements in your agreement apply to their self insurance. Next, you will need to confirm that the contractor has assets available to cover any losses in the event they occur. This would normally include the review of their independently audited financial statements. Finally, you may require the contractor to issue a bond or a letter of credit to your Entity in an amount necessary to cover any losses.

***27. The contractor states that he is a sole proprietor and does not carry workers' compensation insurance as he has no employees, is this acceptable?***

**Yes;** many contractors are either sole proprietors or partnerships. You should receive a letter from the contractor stating they are either the owner of the organization or a partner, and are exempt from the State's workers' compensation requirements because they have no employees.

***28. Should I require wet signatures on endorsements to policies?***

It depends. If an endorsement is issued and delivered as a part of the policy it does not need a signature as the complete policy was signed off by an authorized representative when it was issued. Usually there is a schedule of endorsements attached to the signed Declarations page and if your endorsement is listed on that schedule then it was a part of the policy at issuance and does not need a signature. Mid-term endorsements should be signed to confirm that an authorized representative has agreed to the policy change. Keep in mind that all of this effort is intended to raise your confidence that the insurer has agreed to provide the required coverage, rather than an unauthorized intermediary. Indeed, you could next require that the signatory prove that he or she is authorized – which you might do if the signatory is a retail broker or agent, rather than a company underwriter or delegated managing general underwriter. At some point, it is reasonable to assume that the people who are issuing documents to you have the authority to do so.

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## Introduction - Why Bother?

Let's face it, dealing with indemnity and insurance requirements can be tedious. No one likes to haggle about the terms of a contract or worry about whether a contractor has provided the correct insurance. Requesting, obtaining, and verifying insurance for contracted goods and services takes time, can be aggravating, and most often doesn't seem to make any difference, since most contracts are completed without incident. However, when an incident occurs, all of those efforts become worth it. Public entities and businesses have saved millions of dollars by successfully tendering claims or suits arising from contracted goods or services, from the largest public works projects to the smallest service contracts.

The reasons for including a strong indemnification clause in your contracts and requiring insurance coverage include:

- Your entity can be held liable for damages caused by your contractors
- You should be able to rely on the contractor's expertise to do the job safely, and if it doesn't, it should pay for the consequences
- Responsibility encourages safety on the part of the contractor
- Risk is placed upon those best able to control the work
- You have a source for payment of claims against your entity
- Maintaining your own project or entity budget
- Maintaining your own good loss history and lower insurance costs

And remember, it is never a good thing to be the one responsible for costing your agency the significant expense of a large claim that could have been tendered to your contractor and paid by its insurance company. So, while it may be tempting to ignore the indemnity and insurance requirements in your contracts and accept whatever the contractor sends you as proof of insurance, consider it a required measure of due diligence that could result in significant savings for your entity.

## CHAPTER ONE

### CONTRACTUAL RISK TRANSFER – THE BASICS

#### SUMMARY

*This chapter describes the basic steps in administering insurance clauses in contracts where the other party is required to provide insurance to protect your Entity, its officials, employees and volunteers. The five basic steps are:*

- 1. Analyze the Risks and Relationships*
- 2. Use a Hold Harmless (Indemnity) Agreement*
- 3. Select the Appropriate Insurance Specifications*
- 4. Verify Insurance Coverage*
- 5. Report Claims Promptly*

In the practice of good risk management, your Entity should attempt to transfer the risk of accidental loss accruing through its contractual relationships. Usually, your Entity will require the other party to a contract (contractor) to assume your Entity's liability arising out of the contractor's negligent delivery of products, services, or activities. This transfer generally is appropriate, as the contractor is most often the party in the best position to control loss.

This intended transfer of risk is achieved by requiring suppliers, contractors, tenants, and users of public facilities (i.e. the other party to most Entity contracts) to hold your entity harmless in an indemnification agreement arising from their products, activities, or use of your facilities. The best way to assure that the transfer actually takes place (i.e. that a loss will be paid by someone other than your Entity) is to require a strong indemnity agreement and insurance appropriate in the contract for goods or services. In addition to protecting the contractor, the insurance should also protect the Entity, its officers, officials, employees, and volunteers.

This section is intended to give users a brief overview of the contractual risk transfer process and a set of insurance specifications that will apply to most situations. Many users will find that this section provides all the tools they need. Each step of the process is discussed in more detail in the following sections, including additional specifications for certain types of contracts, sample insurance forms, checklists, and references for additional resources.

#### **Contractual Risk Transfer - The Steps**

1. Analyze the Risks & Relationships
2. Use a Hold Harmless (Indemnity) Agreement
3. Select the Proper Insurance Requirements
4. Verify Coverage
5. Report Claims Promptly

### **Step 1: Analyze the Risks and Relationships**

Review the scope of work, persons capable of completing it successfully, and the relationship that person will have with your entity. Pay special attention to the scope of work. Is it sufficient to describe the work to be performed, especially in case of a dispute as to who was responsible for certain duties, such as maintenance? Make sure you understand what is to be accomplished based on what is written in the scope.

Step back and think about the objectives to be accomplished and ask “What could go wrong?” What are the critical steps in completing your objectives? Is the contractor qualified? Focus on the risks and remember each situation is unique. The risks and your options for managing them will vary. It’s worth the time to learn as much as you can about the work, the contractor, and the risks involved to develop the best ways to protect your entity and avoid wasting your efforts on requirements that aren’t needed or won’t be effective.

It’s a mistake to think that a contract for a small job or service carries with it a small risk of loss, but contract managers often don’t pay as much attention to the risks inherent in smaller contracts. Some contracted services do carry more risks; even the smallest job has the potential for catastrophe. For this section, we are assuming the typical kinds of risks for most contracted services, such as professional services, maintenance agreements, and other contracted work performed for your entity, with the exception of construction contracts. Please see Chapter 3 for more details regarding construction projects and Chapter 4 for a discussion of other special types of situations.

Appendix A, “Risk Assessment”, has more information about identifying and prioritizing risks, including common questions to ask and references for conducting risk assessments, the first step in the risk management process.

### **Step 2: Use a Hold Harmless**

Your contracts should contain a Hold Harmless (Indemnity) agreement that includes an obligation to defend your entity (including employees, officials, agents, etc.) and is meant to be interpreted as broadly as possible in your favor. Hold Harmless is language that shifts responsibility for loss or damage arising from the activities of a contract from one party (your entity) to the other (the contractor). Remember, in performing services for you, the contractor is acting as your agent, and any damages it causes while performing work on your behalf can be collected against you. “Hold Harmless” language allows you to tender the claim of the damaged third party to the contractor for defense and indemnity by the contractor or their insurer.

Good Hold Harmless language for most contracts (with the key terms in bold) reads as follows:

**Hold harmless:** to the fullest extent permitted by law, Contractor shall **hold harmless, defend** at its own expense, **and indemnify Entity** its officers, employees, agents, and volunteers, **against any and all liability, claims, losses, damages, or expenses, including reasonable attorney's fees, arising from all acts or omissions to act of contractor or its officers, agents, or employees in rendering services under this contract; excluding, however, such liability, claims, losses, damages, or expenses arising from Entity's sole negligence or willful acts.**

It is preferable to use your own contract form with language that has been drafted by your attorney, but at times you may have to accept someone else's form or negotiate the terms of your Hold Harmless with the prospective contractor. If you do have to make changes or accept another form, always have your attorney review and approve any language before you sign.

Sometimes your options are limited, and some service providers work very hard to limit their obligations. There are limits to the extent to which you may be held harmless, and there are two special restrictions for public entities, for construction and design professional contracts, that are discussed in more detail in Appendix C. That section also contains a good waiver for participants in sporting or volunteer activities.

### **Step 3: Select the Appropriate Insurance Specifications**

A Hold Harmless is the Contractor's promise to pay for claims caused, in whole or in part, from its activities. Requiring insurance helps to ensure the contractor will have the money to deliver on that promise. Therefore, it's important to require insurance of the proper type and in sufficient amounts to protect your entity.

It's also important to inform contractors of the insurance requirements early in the contract or bid process. This accomplishes two goals. First, it eliminates any questions that the bidder may have about the nature of the required insurance. Second, the bidder has the opportunity to forward the forms to its insurer or agent for approval before the bid is submitted, thus eliminating delay or the submission of unacceptable insurance documents after the contract or bid is awarded.

To make this process easier, we suggest including the insurance specifications as an appendix or attachment to the contract, with a reference to them in contract itself. In Chapter Two we have also provided a sample set of instructions for the contractor and agent, including a description of the contracted work or service, the applicable dates coverage is required, and space for any special instructions.

### **Sample contract language for insurance requirements:**

**INSURANCE REQUIREMENTS.** Contractor agrees to have and maintain the policies set forth in Exhibit A entitled "INSURANCE REQUIREMENTS," which is attached hereto and incorporated herein. All policies, endorsements, certificates, and/or binders shall be subject to approval by the Entity as to form and content. These requirements are subject to amendment or waiver only if so approved in writing by the Entity. A lapse in any required insurance coverage during this Agreement shall be a breach of this Agreement.

**Basic Insurance Specifications** – the end of this Chapter contains a set of Insurance Requirements for Most Contracts that can be used for most contracts. The professional liability (E&O) insurance can be waived or deleted if the contract does not involve professional services. The specifications (specs) contain a note for the contract administrator’s reference to help decide if professional liability insurance is needed.

For construction and environmental services contracts please see Chapter Three for a complete set of specs and explanation. Chapter Four contains specifications for other types of special situations, including contracts with private individuals, cyber risks, instructors and special events. The rest of this section provides an explanation of the requirements for most contracts. Links are provided to the language in the requirements for key terms so you can review them along with the explanation.

For commercial contracts, the types of insurance regularly required are:

- **Commercial General Liability (CGL)** - fundamental coverage for bodily injury, property damage, and personal injury arising from the contractor’s activities.
- **Business Auto Coverage Form (CA 00 01)** – important for any work or service involving the use of motor vehicles, and a legal requirement for all vehicle owners.
- **Workers’ Compensation (WC) & Employers Liability (EL)** – all employers must provide this insurance or be registered as a Self-Insured entity with the State. This is not required for sole proprietors or companies that have no employees, typically professional partnerships that use contracted administrative support.

For professional services contracts, particularly with licensed professionals such as architects, engineers, attorneys, accountants, and insurance brokers, you should also require:

- **Professional Liability (or E&O - Errors and Omissions)** – this provides coverage for errors in professional judgment that lead to damages to your entity or others.

**Limit of Insurance:** the minimum limit recommended is \$2,000,000 per occurrence, accident, or claim, for CGL, CAL, and E&O, respectively. If you accept \$1,000,000 per occurrence and an aggregate limit applies (a limit on the amount the insurer will pay for all claims in one policy period, typically one year) it should be no less than \$2,000,000.

For Workers’ Compensation Insurance, you should require “Statutory Limits”, that is, coverage that is as high as the statute provides (essentially unlimited), with Employers Liability limits of \$1,000,000 per accident or disease.

Keep in mind, these are recommended minimum limits that should be increased for a number of activities that are considered higher risk, including construction contracts. Please refer to subsequent chapters and Appendix D for more information and a reference table for situations in which higher limits are recommended.

### **Other Recommended Insurance Requirements**

In addition to the basic coverage outlined above, your entity should also request the following protection:

**Additional Insured:** an endorsement to the Commercial General Liability (CGL) policy and language in the standard Business Auto Coverage Form (CA 00 01) policy will name your entity

as an insured under the contractor's policy for covered claims arising from their work or activities on your behalf. This status gives you direct rights under the Contractor's insurance and greatly increases your chances of recovery, especially for your legal defense. This is not required under the WC policy and is not available under E&O policies.

**Primary Coverage** – for all the insurance policies, you want to require the Contractor's insurance to be the first to cover any claim, with your coverage applicable only if the Contractor's is exhausted. An endorsement is generally not required for the standard Business Auto policy as primary insurance language is written into the standard policy form but is recommended for the CGL policy, especially for high risk activities.

**Waiver of Subrogation** – if an insurer pays a claim, any rights their insured may have to recover all or part of the payment from someone else are transferred to the insurer. That process and the insurer's attempts at reimbursement are called subrogation. Your insurance requirements should contain a waiver of the Contractor's rights to recover such payments, and we recommend an endorsement to the WC policy in most cases.

**Notice of Cancellation** – you want to be notified if the policy is cancelled. You should be notified of cancellation by the Contractor's agent or broker if he or she sent you a Certificate of Insurance verifying coverage, but unless you request an endorsement to the policies, failure to notify on the agent or broker's part does not prevent cancellation without proper notice.

### **General Insurance Recommendations**

**Deductibles and Self-Insured Retentions:** you want to make sure any amounts a Contractor must pay before its insurance applies are known and the contractor is capable of paying those amounts if needed.

**Verification of Coverage:** proof of the Contractor's insurance coverage is usually provided by its agent or broker with a Certificate of Insurance listing the types of coverage, insurers providing the coverage, policy period, and limits. Your entity will be listed as the Certificate Holder and if you are additionally insured, the agent will provide you notice if any policy is cancelled prior to the expiration date. For ongoing contracts you should receive a new Certificate when the policies expire, but if not, you will need to follow up for proof of ongoing coverage. Make sure the agent is aware of the length of the contract when requesting the initial certificate and your entity should be notified automatically when their coverage renews.

A Certificate of Insurance is NOT enough proof of coverage when your entity wants to be named as an additional insured on the contractor's CGL policy; you MUST also have an endorsement in order to be so. The standard CGL contains "contractual liability" coverage which affords the insured coverage for liability they assume in most contracts, and some policies may automatically name your entity as an additional insured if required in a written contract, or they may issue a "blanket" endorsement to that effect, but you will want to obtain proof of your status, either through the endorsement or a copy of the applicable policy language.

**Acceptability of Insurers:** the specifications list a minimum A.M. Best rating of A:VII. You can look up an insurer's rating by going to [www.ambest.com](http://www.ambest.com). At times you may run into an insurer that does not have the minimum rating or that is not rated by A.M. Best, particularly if your contractor is covered by a captive, Self-Insured Group (SIG), risk pool, or other "alternative" risk transfer mechanism. In such case you will need to research the company by

referring to the Internet or requesting documentation from the agent. Also, enlist the advice of your insurance broker or risk management consultant.

**Claims-Made Policies:** most Professional Liability insurance policies, and other specialized policies such as Environmental Impairment (Pollution) or Educators Legal Liability, are written on what is known as a “claims-made” basis. This means the policy in force on the date a claim is made against the Contractor is the one that covers the loss, not necessarily the one that happens to be in force on the date the work begins or, as with an “occurrence” policy, the date when an accident that causes damage occurs.

For the work of Architects and Engineers, it may be many years after the design work is completed and the structure put to use before errors or defects in the design become apparent and a claim is filed. For this reason, it is recommended that you require proof of ongoing coverage for design work, at least three years, and often up to as long as ten years after a job is complete.

This section of the requirements can often be deleted if the contract does not involve professional or environmental services.

**Special Risks or Circumstances:** each situation is unique, and you may encounter a type of risk or coverage that requires more limits, acceptance of a lower A.M. Best rating, or a waiver of one of the recommended requirements. You should always reserve the right to modify your requirements to meet such demands, especially when conducting a bid process that could lock you in to rejecting an otherwise acceptable proposal.

#### **Step 4: Verify Coverage**

##### **Review the completed forms promptly.**

You should receive at least two documents verifying coverage, a Certificate of Insurance and an Additional Insured (AI) Endorsement (or a copy of the applicable policy language confirming your AI status by written contract). Review the forms to be sure they are completed fully, that they have been signed by an appropriate party, and that no items have been crossed out or altered. Note the expiration date of the policies. If any policies expire during the term of the contract or project, you should set up a suspense file for forty-five (45) days before the expiration of the insurance. At that time, if you have not received proof of renewal or replacement of coverage, you should send a letter (including the current forms) to the other party stating that your Entity requires receipt of a new set of forms before expiration of the existing coverage.

This manual provides a one-page checklist that can be completed for each contract (see Appendix D for examples). This checklist is used to compare the Entity’s specific requirements to the certificate(s) and endorsements provided. If something is missing, contact the contractor’s broker or agent to obtain the necessary certificates and endorsements. You can also enlist the assistance of your Risk Manager to contact insurance brokers/carriers to obtain all documents required to comply with your contract provisions. Please refer to Chapter Five for more guidance and details on verifying compliance.

##### **Save the signed forms.**

Save the forms with the rest of your contract documents. Contracts and insurance documentation for construction projects should be saved **indefinitely**, as claims may be presented many years after work is completed. The forms may be your Entity’s only proof of coverage. For other types

of contracted work, follow your own record retention policies, but be aware that certain types of contracts, particularly for environmental services or other work that has the potential to generate claims far into the future should also be kept indefinitely.

### **Step 5: Report Claims Promptly**

**Inform the other party's insurer immediately, in writing, of any incidents or claims arising out of the work. Send a copy to the Contractor and its agent as well.**

Some liability insurance policies require reporting of accidents or other covered losses as soon as it is practical to do so and do not impose any specific deadline. Others require reporting of accidents immediately, but again leave that term undefined. Some policies written on "claims-made" forms impose strict deadlines on claim reporting. The sample forms provided in this manual include sample correspondence for reporting claims. As you may not have immediate access to the policy's notice-of-claim requirement clause, you should assume the worst case version and report incidents or claims to the other party's insurer immediately. If you have a copy of the policy, follow the reporting procedures explicitly.

Most insurance policies require reporting of incidents or claims to the insurer. However, it is customary with most insurance buyers to report such events to the insurance agent, and to allow the agent to pass the information along to the insurer. While convenient, this practice does not fulfill the insured's contractual responsibility to report events to the insurer. Therefore, the safest practice is to report the event to the insurer, with secondary notification to the agent. If you report by telephone, make a note of it, including the date and person spoken to. Follow up in writing as soon as possible.

You should also notify your own insurance company, claims administrator (TPA), agent or broker of the claim in order to protect your rights under your policy. If the Contractor's insurer delays or disputes acceptance of the claim you may need to rely on your own resources to protect your interests while the issue is resolved. Your insurer or TPA should continue the negotiations with the Contractor's insurer on your behalf to successfully tender the claim to them, but at times these issues are not resolved until the claim is ready to settle. It may even be necessary to file a suit against the Contractor and/or insurer to enforce your rights, something that your insurer should do on your behalf.

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**EXHIBIT A****INSURANCE REQUIREMENTS FOR MOST CONTRACTS****(Not for Construction Contracts)**

Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder and the results of that work by the Contractor, his agents, representatives, employees or subcontractors.

**MINIMUM SCOPE OF INSURANCE**

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office (ISO) Form CG 00 01 12 07 covering CGL on an “occurrence” basis, including products-completed operations, personal & advertising injury, with limits no less than **\$2,000,000** per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. **Automobile Liability:** ISO Form Number CA 00 01 covering any auto (Code 1), or if Contractor has no owned autos, hired, (Code 8) and non-owned autos (Code 9), with limit no less than **\$1,000,000** per accident for bodily injury and property damage.
3. **Workers’ Compensation:** as required by the State of California, with Statutory Limits, and Employer’s Liability Insurance with limit of no less than **\$1,000,000** per accident for bodily injury or disease.
4. **Professional Liability (Errors and Omissions):** Insurance appropriate to the Contractor’s profession, with limit no less than \$1,000,000 per occurrence or claim, \$2,000,000 aggregate. *(If applicable – see footnote next page)*

If the contractor maintains higher limits than the minimums shown above, the Entity requires and shall be entitled to coverage for the higher limits maintained by the contractor.

**Other Insurance Provisions**

The insurance policies are to contain, or be endorsed to contain, the following provisions:

***Additional Insured Status***

**The Entity, its officers, officials, employees, and volunteers are to be covered as insureds** on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Contractor’s insurance (at least as broad as ISO Form CG 20 10, 11 85 or both CG 20 10 and CG 20 37 forms if later revisions used).

***Primary Coverage***

For any claims related to this contract, the **Contractor’s insurance coverage shall be primary** insurance as respects the Entity, its officers, officials, employees, and volunteers. Any insurance

or self-insurance maintained by the Entity, its officers, officials, employees, or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.

### ***Notice of Cancellation***

Each insurance policy required above shall provide that **coverage shall not be canceled, except after thirty (30) days' prior written notice** (10 days for non-payment) has been given to the Entity.

### ***Waiver of Subrogation***

Contractor hereby grants to Entity a waiver of any right to subrogation which any insurer of said Contractor may acquire against the Entity by virtue of the payment of any loss under such insurance. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the Entity has received a waiver of subrogation endorsement from the insurer.

### ***Deductibles and Self-Insured Retentions***

Any deductibles or self-insured retentions must be declared to and approved by the Entity. The Entity may require the Contractor to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

### ***Acceptability of Insurers***

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Entity.

### ***Claims Made Policies (note – should be applicable only to professional liability, see below)***

If any of the required policies provide claims-made coverage:

1. The Retroactive Date must be shown, and must be before the date of the contract or the beginning of contract work.
2. Insurance must be maintained and evidence of insurance must be provided ***for at least five (5) years after completion of the contract of work.***
3. If coverage is canceled or non-renewed, and not replaced ***with another claims-made policy form with a Retroactive Date prior to*** the contract effective date, the Contractor must purchase "extended reporting" coverage for a minimum of ***five (5) years*** after completion of work.

### ***Verification of Coverage***

Contractor shall furnish the Entity with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. All certificates and endorsements are to be received and approved by the Entity before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Contractor's obligation to provide them. The Entity reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

### ***Special Risks or Circumstances***

Entity reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

*Note: Professional liability insurance coverage is normally required if the Contractor is providing a professional service regulated by the state. (Examples of service providers regulated by the state are insurance agents, professional architects and engineers, doctors, certified public accountants, lawyers, etc.). However, other professional Contractors, such as computer or software designers, and services providers such as claims administrators, should also have professional liability. If in doubt, consult with your risk management or insurance advisors.*

## CHAPTER TWO

### INSURANCE SPECIFICATIONS FOR MOST CONTRACTS

#### SUMMARY

*This chapter describes considerations for drafting insurance specifications for most contracts. Sample specifications are included as exhibits in this chapter and for more complex or specialized contracts in the next two chapters.*

The following section provides more detail to explain a number of the issues that need to be considered in drafting insurance requirements, as well as providing specifications for the most common types of contracts for public entities.

#### **Evaluate the Risk**

Before determining the types of insurance to be required, you must have some idea of the types of harm that could arise from the activities contemplated under the contract. Review the scope of work and talk to the contract manager and/or contractor to be sure you understand the work or service to be performed and that it is adequately described in the Scope. Refer to Appendix A for more information on Risk Assessment.

#### **Use the Appropriate Contract Template**

Every organization should implement a system that establishes procedures for developing and approving contracts. We recommend that your Entity create templates for the types of contracts typically used by departments within your Entity. This makes the process of selecting and reviewing the contract terms much easier, since the language has already been reviewed and approved by your attorney. Any changes to the template should be approved by legal counsel prior to signing.

Common contract templates should include:

- **General Services:** for most contracts, including routine maintenance of facilities or grounds
- **Construction:** for public works projects or major remodeling of facilities
- **Design Professional Services:** for the services of architects, engineers, and land surveyors
- **Professional Services:** for all other professional service providers, such as attorneys, accountants, medical professionals, and insurance brokers
- **Leases and Rentals:** for long and short-term use of your real property and/or personal property/equipment

One important reason for having a separate template for design professionals is a limitation on the type of Hold Harmless agreement you may require for their services. There is also a limitation on the Hold Harmless you can use for construction contracts. Refer to Civil Code §2872 and see Appendix C for a full discussion of these limitations and recommended language.

## **Insurance Requirements**

Insurance requirements in a contract ensure that the organization you are contracting with will have adequate assets available in the event of a loss arising out of the work performed for your Entity. The use of insurance is not the only means of guaranteeing that an organization will have adequate resources. Some very large organizations may choose to self-insure their liabilities. In that event, you may need to examine the organization's financial statements or receive a letter of credit from a banking institution to guarantee the adequacy of assets. For the rest of this chapter, we will focus on insurance as the means for effective risk transfer.

### **Be as specific as possible in describing types of insurance required**

Avoid using phrases which do not have a specific meaning. For example, the term "public liability" does not have a definite meaning in common usage or in the insurance industry. If you use an ambiguous term, your Entity may intend that a relatively broad coverage be purchased, yet a limited coverage form would still comply with the written requirement. This ambiguity is reduced by stating the titles or exact types of coverage forms to be maintained. The insurance specifications provided in this manual refer to specific Insurance Services Office (ISO) coverage forms wherever possible. While not all insurers use ISO forms, they should have similar forms or policy language they can provide. However, use of non-standard ISO language is a reason to review the forms and endorsements carefully, including a review of the policy language if in doubt.

In particular, your Entity should require that liability insurance be written on an "occurrence basis". "Claims-made" coverage should be accepted only as an exception after verifying that occurrence based coverage is not available. Professional liability insurance is usually available only on a claims-made basis and will be discussed later in this chapter.

### **Describe maximum deductibles or self-insured retentions that the other party may maintain**

If the other party maintains substantial deductibles or self-insured retentions (SIRs), your Entity must seek reimbursement directly from the other party in accordance with the indemnity or hold-harmless clause of the contract. If the other party is financially unable to reimburse your Entity, or if the indemnification clause in the contract is set aside by a court, your Entity would bear the amount of the deductible (or retention) or perhaps be left with no coverage at all from the contractor's policy. As of this writing, at least one court has held that an additional insured to a policy has no right to satisfy the SIR if the named insured is unable to do so, based on policy language that unambiguously allowed only the named insured to satisfy the SIR. This situation can also occur when the subcontractor is not named in a suit and therefore is not required to respond and spend money that would count toward the SIR. In such cases, your entity may have to file a cross-complaint to force the subcontractor to respond and satisfy the SIR.

If deductibles or SIRs are substantial, you can request the other party post a bond guaranteeing payment of losses and defense costs within the deductible layer. As an alternative, the other party's insurer may be willing to reduce or eliminate the deductible as respects your Entity's interests, most likely for an additional premium from the Contractor. Other options including requiring policy language that allows an additional insured to satisfy the SIR and vendor contract

language that allows your entity to withhold payment up to the amount of the SIR and act as the contractor's agent in satisfying the policy SIR.

Also, some policies with SIRs do not require the insurer to provide legal defense. In such cases, your Entity might have to pay its own defense or seek reimbursement from the contractor. Moreover, a recent decision in California held that the insurer did not have to pay claims where a bankrupt insured was not able to personally satisfy the SIR. Therefore, you should require disclosure and approval of deductibles or SIRs and discuss them with your risk management advisor as necessary.

### **Require the addition of your Entity, its officials, employees and volunteers as insureds to all required liability coverage**

Standard contract conditions should specify that your Entity, its officials, employees, and volunteers be added by endorsement as insureds to all liability policies, except workers' compensation or professional liability (errors & omissions) policies.

When the contractor will be employing subcontractors, request that they be required to maintain at least the same insurance as required of the general contractor. You may require the contractor to provide your Entity with the required endorsements or insurance policies from each subcontractor which name the Entity, its officials, employees, and volunteers as insureds. It is common practice for an owner to require a contractor to furnish these endorsements, particularly for construction projects.

For large construction projects with consolidated insurance programs ("wrap-ups" aka OCIP's), the insurer will include all subcontractors as insureds under the insureds (contractor's) policies.

### **Require that the other party's insurance be primary**

To simplify loss adjustment and to eliminate the possibility that the other party's insurer will seek contribution from your Entity, your Entity's standard requirements should state that the other party's insurance is to provide primary coverage, and that your Entity's insurance or self-insurance program will not be called upon to contribute to a loss that should otherwise be paid by the other party's insurer. If your contractors' insurer uses standard ISO forms, this condition will automatically be taken care of as a standard Additional Insured endorsement includes this language, and such is also the case with the most current ISO Commercial Automobile Liability form.. Applicable language will be found in the "Other Insurance" section, or is included as part of the additional insured language protecting your Entity. If the agreement on primary insurance is merely stated in your contract with the other party and is not included in the policy, the condition is not binding on the insurer.

### **Require that your Entity be given at least thirty (30) days notice of cancellation of insurance coverage, with ten days notice for non-payment**

Your Entity's standard insurance requirements should state that the insurer will provide at least thirty (30) days written notice of cancellation. Sixty (60) days notice is better, and is required by law in many states. However, in CA the requirement is only ten (10) days for notice of cancellation due to non-payment. The standard certificate of insurance language has recently changed noting that notice of cancellation will only be given "in accordance with policy

provisions”, which now clarifies what was always the intent. For this reason, if notice is required, it needs to be endorsed on to the policy like the additional insured status.

Prior editions of this manual have recommended requiring an endorsement requiring notice of cancellation or coverage changes with 30 day’s notice by USPS registered mail with a return receipt. This approach does not seem feasible in the current environment of electronic communications and express mail services. Moreover, some insurers refuse to take on this obligation and, in some states, the cancellation requirements are stronger.

Most often you will not receive an endorsement regarding notice of cancellation even when your specifications require it. This is an area to use your judgment regarding what is reasonable and obtainable in light of the risks involved.

If a contract involves a risk so substantial that the risk of cancellation or coverage reduction is heightened, you should require an endorsement or even consider a project specific policy with the Entity as an Insured may be warranted. For example, the insurance requirements for construction and environmental risks (Exhibits 5 & 6) require an endorsement to the policies for notice of cancellation.

Statements made on a certificate regarding cancellation notice do not have the same effect as the same statement made in an insurance policy or endorsement. Insurance industry-supplied certificates of insurance usually only state that the insurer or its agent will “endeavor to” provide the required number of days notice of cancellation. Sometimes the words “endeavor to” may be crossed out on the certificate form. However, this change has no practical effect on the insurer but could lead to an E&O on the part of the agent, since generally, if notice is not sent, the coverage still terminates. You should presume that the certificate does not grant any conditions not contained in the policy.

**Specify that the insurance is to be placed with insurers that meet a certain minimum rating, unless otherwise acceptable to your Entity**

The ratings given by A.M. Best and Standard & Poor’s are widely used as standards for measurement of insurer acceptability. Insurer ratings are available on-line from each company at <http://www.ambest.com> and [www.standardandpoors.com/ratings/insurance](http://www.standardandpoors.com/ratings/insurance).

The A.M. Best rating is a two-part rating, separated by a colon. The first portion is the assessment of the quality of assets held. The second, given as a Roman numeral ranging up to XV, indicates financial size by policyholders’ surplus. Standard & Poor’s uses a single rating scheme measuring the company’s overall financial strength.

The management ratings currently used by A.M. Best and the overall ratings used by Standard & Poor's are:

A.M. Best Ratings		Standard & Poor's Ratings	
A++, A+	Superior	AAA	Extremely Strong
A, A-	Excellent	AA +/-	Very Strong
B++, B+	Very Good	A +/-	Strong
B, B-	Good	BBB +/-	Adequate
C++, C+	Fair	BB +/-	Less Vulnerable
C, C-	Marginal	B +/-	More Vulnerable
D	Below Minimum Standards	CCC +/-	Currently Vulnerable
E	Under State Supervision	CC +/-	Currently Highly Vulnerable
F	In Liquidation	R	Under Regulatory Supervision

+,- These signs following the letter rating indicate the relative position within the class

The above analogy between A.M. Best and Standard & Poor's ratings is not exact. Each rating system has its differences and the ratings are based on slightly different criteria and/or weighting. The use of both rating systems provides a better understanding of the strength or weakness of the company.

A.M. Best also rates insurance companies by their policyholders' surplus. Class I is the lowest Financial Size category, indicating a policyholders' surplus of under \$1,000,000. Class XV, indicates policyholders' surplus of over \$2,000,000,000. In the middle, Class VII surplus ranges from \$50,000,000 to \$100,000,000.

Your Entity should require that insurance be placed with companies that have a minimum A.M. Best rating of A:VII and a Standard & Poor's Rating (if rated) of at least BBB unless specific approval for a lower rating has been granted by your Entity. This requirement does not guarantee that the insurer will be solvent when called upon to pay a loss, but it does reduce the possibility of coverage being placed with a clearly unqualified insurer.

Your Entity should only accept a lower-rated insurer if no other insurer will provide the coverage. **Be aware**, however, that there may be a significant risk that the insurer will not be able to pay a claim for which your Entity may then become responsible. If in doubt, contact your insurance advisor prior to approving the forms. Special consideration and evaluation should be undertaken when coverage is provided by Self-Insured Groups (SIGs), captives and risk pools. Many governmental agencies purchase coverage through pooling arrangements, so you should not be surprised when contracting with another governmental agency if their coverage is provided by a pool. Pool financials are public information, and it is easy to discover the strength of any particular pool. SIG financial information may or may not be accessible, but should be requested if there is a concern. Contract documents should specifically address alternative risk transfer programs where possible.

### Fit the Insurance Limits to the Situation

This is the most difficult principle of all to apply effectively. Judgment and experience are required to set required insurance limits. Precedent also plays a significant role. It becomes

difficult to require \$5,000,000 limits from one contractor if the Entity has previously required only \$1,000,000 for similar projects. Nevertheless, if most contractors carry limits less than you think are appropriate, it is possible they are underinsuring their risks and you should not hesitate to ask for more.

In our view, the \$2,000,000 limit stipulated in the sample insurance requirements is the minimum limit to require. Higher limits should be required for any hazardous activity, such as blasting, or where the activity has a severe loss potential, such as construction close to highways, utility lines, or high-valued property. You should consider the loss exposure, not the value of the contract, in determining appropriate limits. Some jobs, such as spraying of pesticides or backhoe operation near utilities, involve substantial potential liabilities even though the contract may involve only a small expense. Checklists at the end of this manual will help identify hazardous exposures, including a chart in Appendix D that lists recommended limits for different types of activities.

### **How much is enough?**

The saying, “A million dollars just ain’t what it used to be,” rings truer with the years. This manual has required a \$1 million general liability limit as the basic limit since the early 1980’s. The editors are now recommending limits of \$2 million for basic commercial contracts (without construction) and \$5 million for contracts with construction risks. Please keep in mind that because of annual limitations on policy payments (“aggregates”, see below) in standard policies unless a contract specific policy is written, your entity is sharing the contractor’s policy limits with all of the contractor’s other customers.

Note that increasing jury verdicts and recent changes to coverage forms make higher limits advisable. Studies have shown that jury verdicts against public entities have risen more than 50% in recent years (see [www.iii.org](http://www.iii.org) and search for “jury verdicts”, or see [www.jvra.com](http://www.jvra.com) and look for “Government Liability”). Also, recent changes to the CGL insured contract definition may bring defense costs within the limit of insurance, eroding the coverage available. The changes place defense costs within the limits of liability if there is a conflict, or your Entity selects separate defense counsel. Moreover, some policies and endorsements now limit coverage to the amounts of limits requested in the additional insured’s written agreement.

The editors understand that smaller vendors, sole proprietors, and individuals may not have \$2 million of limits. This is where the art of risk management plays a role. Your entity must determine when to allow lesser limits. We suggest that standard tests be applied. For example, you might decide that any contract that does not include a products or completed operations exposure, is low enough risk to allow a lesser limit such as \$1 million. Note that these other agreements may not always be low risk, so the risk manager’s best weapon – common sense – must carry the day.

### **Aggregate Limits**

Many liability insurance forms in use today impose aggregate (total of all claims) limits on all losses paid by the policy for the policy period (usually one year). There are usually three types of aggregates: a products and completed operations aggregate; a personal injury and advertising injury liability aggregate; and a general aggregate for all other types of losses. If the contractor purchases a Commercial General Liability policy, any losses arising out of projects for that

contractor's other clients would also reduce the aggregate limit available for losses arising out of its work for your Entity. Therefore you may wish to require:

- A higher aggregate limit which is a multiple of the occurrence limit; for example, a \$1,000,000 per occurrence limit with a \$2,000,000 aggregate, or
- A separate aggregate limit for your project or lease, or
- A policy dedicated to your project.

None of these solutions is a perfect answer. Even a higher aggregate limit may be insufficient if the contractor experiences a large number of substantial claims during the coverage period. A possible solution is to require that the contractor provide higher limits through a combination of excess and primary policies. In this case, evidence of excess coverage should be provided on the same certificate form. On large projects, this approach may be the most feasible.

The insurer may decline to provide a separate or higher limit for your Entity's project. If the insurer is willing to provide a higher limit, the contractor may be asked to pay additional premium. The cost of this premium may be passed along to your Entity if the contractor must obtain this coverage in order to receive the contract award.

The discussion above applies to coverage under the current ISO Commercial General Liability policy form. Other variations of endorsements adding aggregate limits exist. You should review these forms carefully when evaluating aggregate limits on your contractor's liability policies and seek assistance from your insurance advisor as needed.

### **Specify that the Insurance Must Remain in Effect for the Duration of the Project or Lease**

You should state in the contract that the required insurance must be in effect prior to awarding the contract and that it or a successor policy must be in effect for the duration of the project or lease. A clause in the contract should state that maintenance of proper insurance coverage is a material element of the contract and that failure to maintain or renew coverage or to provide evidence of renewal may be treated by your Entity as a material breach of contract. For large, ongoing projects you may want to include a provision allowing your Entity to withhold payment to purchase insurance to replace any expired coverage.

For construction projects or claims-made policies you will want coverage to extend a number of years past the end of the project. See the discussion in Chapter Three on Construction and Professional Services contracts for more detail.

### **Professional Services Contracts**

Professional service providers (consultants) include those who are licensed by the state, including architects, engineers, attorneys, medical service providers, accountants, and insurance agents, brokers, and claims administrators. However, there are a wide variety of professional services that fall outside state licensing, including computer system designers and programmers, safety professionals, and risk management consultants. The key is whether you are relying on a consultant's professional judgment and if an error in judgment could lead to damages to your Entity or a third party.

A consultant is guilty of professional negligence when damages result from a failure to exercise the same standard of care that another consultant in the same practice and geographic area would use. Examples of such claims include design errors of architects or engineers and malpractice of

doctors or lawyers. An expert in the subject field is almost always necessary to establish the duty of care and render an opinion on whether or not it was met when attempting to prove a claim for damages.

Claims arising from professional services performed for your Entity will name the consultant, your Entity and any other connected party as defendants. Even though the consultant may be the party liable under the law, your Entity, in the event of even the slightest joint liability, could still be required to pay for all or part of a loss caused by the consultant. In addition, your Entity may have its own claims against the consultant for improper design or other professional negligence that results in damage to your property.

When contracting for professional services, your Entity should ensure that the other party to the contract (consultant) carries sufficient professional and general liability insurance to protect against losses that may result from its negligent acts or omissions. The following discussion addresses a number of issues when dealing with professional services contracts, including:

- Professional Liability (E&O) Insurance
- Additional Insured Status
- Claims-Made Coverage
- Auto Insurance
- Workers' Compensation
- Independent Consultant Status
- Indemnity Limitations

**Professional Liability Insurance:** Professional liability insurance provides protection against covered claims for damages by reason of any act, error or omission committed or alleged to have been committed by the insured. It is also referred to as “Errors and Omissions” or “E&O” insurance. Coverage provided by professional liability insurance policies differs from coverage provided by general liability insurance. General liability policies exclude professional exposures such as design errors. General liability policies are also limited to claims for bodily injury, property damage, advertising injury, and personal injury. Professional liability policies often cover a broader range of economic loss.

Exhibit 2 (at the end of this chapter) provides a sample set of specifications for consultant insurance requirements. Limits required by these sample specifications are \$1,000,000. On large projects, or those with significant potential for loss such as bridges or dams, higher limits are appropriate.

You must also exercise judgment on the subject of minimum acceptable insurer requirements. For some professions, limited insurance markets exist for professional liability coverage. There may be no insurers meeting your Entity’s standard insurer requirements that are willing to write the particular kind of coverage required. In such cases, you must sometimes be willing to relax standard insurer rating requirements. When doing so, you should attempt to evaluate the financial condition of the consultant and its insurer, determine how long the consultant has been in business, how long it has maintained insurance coverage, and how long its insurer has been writing the kind of professional liability in question. For assistance in evaluating professional liability insurers, contact your risk management advisor.

**Additional Insured Status:** Because of the highly personal nature of professional liability insurance (the insurer covers the professional's competence), insurers generally will not add additional insureds to the policy unless they are employees or subsidiaries of the insured. The specifications in this manual do not request additional insured status for professional liability.

**Claims-Made Coverage:** Most professional liability coverage is written on a "claims-made" basis, rather than the "occurrence" or "accident" coverage for general and auto liability. This means the policy in force on the date a claim is made against the consultant is the policy that responds to the loss, not the policy in force on the date damages occur. For architects and engineers especially, the date of a claim may be many years after the design and construction of a structure and months after any defects caused damage. For this reason, this manual recommends requesting continuation of professional liability coverage for at least three to five years after completion of the subject of the design work. For large projects you may want to require an even longer time period and/or require a policy with a built in "tail" for reporting claims in the future.

Because professional liability insurance is almost always written on a claims-made basis, Entities that hire architects or engineers should have concern about coverage for latent defects or design errors that may result in future claims after the current coverage has expired. One solution to this problem is to require the design professional to agree to maintain coverage for a specified period after the project has been completed (extended reporting period, or tail, coverage). However, this requirement may be very difficult to enforce. If the project is large enough, the architect's or engineer's insurer may provide a project policy in the name of the Entity, with a built-in tail. The policy may cover all design professionals on a project. This arrangement affords greater protection for the Entity's interests but will require an additional premium for the separate policy. Therefore, this is only cost effective on large projects (when architects and engineering fees exceed \$1 million).

**Auto Insurance:** If the consultant will use an automobile in any phase of the work performed for your Entity you should also require evidence of automobile liability insurance. In some cases, the consulting firm will own no automobiles and therefore may not purchase automobile liability coverage. However, the firm should obtain coverage for their non-owned and hired automobile exposure. This coverage protects them for claims arising from use of personal or rented vehicles by its principals or employees. If you are dealing with a sole proprietor, proof of personal auto coverage should be required, though you may have to accept less than a \$1 million limit.

**Workers' Compensation:** Your Entity should require evidence of workers' compensation insurance. However, if the consultant has no employees, for example a sole practitioner or a partner in a firm with only contracted support staff, then Workers' Compensation is not required by the State. If that's the case, request written confirmation from the consultant before agreeing to waive the coverage.

**Independent Consultant Status:** Even though the contract with the consultant may make clear that the consultant is hired as a contractor and not as an employee, the courts may find a way to provide workers' compensation coverage or other benefits through Entity resources in the event that a consultant or employee is injured or claims that he or she should be entitled to health, pension, or overtime benefits due to the nature of the contractual relationship.

This is an area to involve legal counsel specializing in employment issues to review the work assignments and performance standards and draft appropriate protections in the contract. The Internal Revenue Service may ultimately make a determination whether or not a consultant should be considered an employee. You can review its criteria on its website at <http://www.irs.gov>. The key factor is the amount of control you exercise over the work, especially whether you have the right to control only the result of the work, not the means and methods. However, there are other factors and other types of benefits to be considered. Your agency should carefully review all consultant agreements to avoid a ruling that you are responsible for benefits, payroll taxes, social security, pension, and Medicare payments as a result of the consultant's function.

**Indemnity Limitations:** Special care is needed in drafting indemnification requirements for contracts with consultants. Appendix C explains special restrictions on indemnity agreements with design professionals. In addition, most professional liability insurers exclude liability assumed under contract by their insureds. However, most general liability policies in use today provide an exception to the contract exclusion to provide coverage for bodily injury and property damage liability assumed under an "insured contract". Therefore, the indemnity agreement should be carefully worded so that the consultant agrees to defend and indemnify your Entity for bodily injury or property damage arising out of the consultant's negligent acts or omissions in performance of the work. This assumption of liability is insurable under general liability policies.

Professional liability policies generally do not contain an "insured contract" exception in their contract exclusions. The exclusion applies unless the liability arises from an error, omission, or negligent act of the insured and would have attached in the absence of such agreement. While the insurer will protect the consultant, it may not honor certain provisions of the hold harmless, such as a duty to defend or pay costs as incurred. For this reason, many consultants attempt to negotiate away such provisions.

In such cases, you may have to rely on the consultant's or another contractor's general liability coverage for defense and ongoing reimbursement of costs, and you may have to file a cross-complaint to assure that the consultant and insurer pay for their share of any loss.

Note, however, that your Entity would seldom be liable for any share of a true E&O loss, as the concept of professional liability applies to a practitioner of that profession. The most common ways your Entity could be directly liable for a professional error include negligently choosing the consultant or negligently signing off on or approving a design or work product. On any large construction loss there will be allegations of professional negligence as well as construction defects attributed to the contractor or various subcontractors, so the goal is to make sure the consultant or insurer pays for its share of the damage.

The area of professional liability insurance does not lend itself to the application of hard-and-fast rules. Flexibility and the exercise of discretion are needed to protect your Entity. Although there are no absolute guarantees to assure that your Entity will not be forced to pay a loss due to errors or omissions of its consultants, the practices described above can help provide a reasonable measure of protection.

**Property Insurance:** Transfer of responsibility for loss occurs in most contracts. Responsibility for damage to property owned by one of the parties is also dictated in some contracts, although this activity is less frequent. There are two primary situations where responsibility for property

loss should be clearly spelled out, buildings in the course of construction, and leases involving extensive tenant improvements and betterments. Course of construction risks are addressed in the next chapter, while leases are addressed below and in Exhibit 3 at the end of this chapter.

### **Tenant's Improvements and Betterments**

Property insurance should be required where your Entity has a continuing interest in improvements or betterments installed by a tenant in one of your properties. Many leases require that such improvements revert to the property owner at the completion of the lease. Often the value of these improvements is factored into the lease cost. In such cases, you should require the tenant to provide sufficient insurance to cover the full replacement value of the improvements and to name your Entity as loss payee on the policy. In addition, you should require a copy of the policy for your review.

It is also important to include a Waiver of Subrogation on property risks whenever you are in a landlord-tenant situation. The major benefits of a Joint Waiver of Subrogation clause are:

- No need to purchase separate fire legal liability
- No dispute over cause of loss between tenant and landlord
- Existing property policy may have built-in language that allows you to waive subrogation in writing as either a tenant or landlord
- You are not relying on another entity's policy nor do you have to verify the adequacy of its coverage as respects to your property

An example of language for a waiver is as follows:

Tenant and landlord agree that insurance carried or required to be carried by either of them against loss or damage to property by fire, flood, earthquake, acts of terrorism, acts of war, or other casualty shall contain a clause whereby the insurer waives its right to subrogation against the other party, its elected officials, directors, employees, volunteers, and agents, and each party shall indemnify the other against any loss or expense, including reasonable attorneys' fees, resulting from the failure to obtain such waiver.

### **Insurance Requirements for Lessees Exceptions for the Civic Center Act**

**"The Civic Center Act,"** Education Code Section 38130, specifies which groups are entitled to the use of school district facilities free of charge, and those groups which the district can elect to charge a fee for use of a school facility.

With respect to the insurance requirements and indemnification language, there are differences in what the district can require depending upon whether the user is a free of charge user or a paying user.

**Free of Charge Users** – Groups entitled to use school facilities free of charge under Education Code Section 38130 must be able to demonstrate the following:

1. There is no other suitable meeting place available;
2. The group is a nonprofit organization;
3. The group is organized to promote youth and/or school activities.

For Free of Charge Users, the school district is liable for any injuries resulting from the negligence of the district and the maintenance of those facilities and grounds. This cannot be transferred. The user shall be liable for any injuries resulting from the negligence of that group during the use of those facilities or grounds.

***The Other Insurance Provisions*** - Clause 1 in Exhibit 3 needs to be amended to state that:

“1. The District, its officers, officials, employees and volunteers are to be covered as insureds with respect to liability arising out of negligence of the user during the use of the facilities or grounds.”

Clauses 2 and 3 should remain unchanged.

**This exception applies only to Free of Charge Users.**

## Insurance Specifications for Common Situations

The four sets of insurance specifications at the end of this chapter have been developed for the most common situations your Entity staff will encounter. If you want to rely on just one set of specifications in this manual, use Exhibit 2. If the contract does not involve professional services, you can delete the required insurance and the section on claims-made coverages. Exhibit 2 is the same set of specifications used in Chapter 1, Exhibit A, but without the notes to provide guidance on when to require professional liability coverage.

Exhibits 5 and 6 are found at the end of Chapter Three, Constructions, and Environmental Services, and Exhibits 7 and 8 are found at the end of Chapter Four, Special Situations. These exhibits are:

- Exhibit 1 Insurance Requirements for Most Contracts (not for professional services or construction risks)
- Exhibit 2 Insurance Requirements for Professional Services
- Exhibit 3 Insurance Requirements for Lessees (No Auto Risks)
- Exhibit 4 Insurance Requirements for Vendors
- Exhibit 5 Insurance Requirements for Construction Contracts
- Exhibit 6 Insurance Requirements for Environmental Services
- Exhibit 7 Insurance Requirements for Rental of Facilities (short term)
- Exhibit 8 Insurance Requirements for Instructors

Exhibits 1 and 2 are the broadest requirements. While Exhibit 1 can be used for tenant or supplier contracts, its requirements are broader than usually needed for such agreements. For example, the exhibit requires automobile insurance. Automobile insurance is not required in most tenant situations.

Exhibit 3 is identical to Exhibit 1 but deletes the automobile insurance requirement. It should be used for most tenant situations, provided the tenant does not use or commercially park vehicles on the leased premises.

Exhibit 4 is intended for contracts that involve only the purchase of equipment or supplies which do not require installation or maintenance by the vendor. It is identical to the first exhibit, except that both the auto insurance requirement and the workers' compensation insurance requirement are deleted.

If the activity or subject of the contract fits into more than one category, use the broadest applicable language. For example, if a vendor will also install or maintain the product or perform other services for your Entity, the vendor should be considered as a contractor for the purpose of insurance requirements. Instead of using Exhibit 4, the broader language of Exhibit 1 or 2 should be used.

Following are some guidelines for determining which set of specifications to use or if special language is needed.

<b>TYPE OF ACTIVITY</b>	<b>SPECIFICATIONS AND LIMITS</b>
<p><b>Maintenance and services contracts</b>, including most routine maintenance, janitorial service, movers, on-site equipment maintenance agreements, tow service, tree maintenance, fireworks exhibits, and other general services.</p>	<p>Use <b>Exhibit 1</b>, with a minimum limit of \$2 million. If \$1 million is used, request at least a \$2 million aggregate limit. Remember to base the required limits on the amount of damage that may occur, not on the contract price.</p>
<p><b>Construction projects</b></p>	<p>Use <b>Exhibit 5</b>. Construction projects will usually require course of construction (builder's risk) property insurance. Major construction projects, especially those which involve many subcontractors, may call for special insurance requirements. See Chapter Three for a more complete discussion.</p>
<p><b>Professional services</b>, including architects, engineers, consultants, counselors, medical professionals, hospitals, clinics, attorneys, and accountants.</p>	<p>Use <b>Exhibit 2</b>. Your Entity should require proof of professional liability insurance.</p>
<p><b>Environmental risks</b>, including asbestos, hazardous chemicals or waste, and nuclear risks.</p> <p><i>[Reminder: Your Entity is unlikely to have pollution coverage through its primary liability insurance or risk pool. If you don't transfer the risk, your Entity could be totally responsible for a loss.]</i></p>	<p>Use <b>Exhibit 6</b>. However, coverage specifications and limits should be developed to fit the circumstances of the situation. Generally, limits should be no less than \$2 million. Special insurance is available for hazardous activities, including nuclear risks, asbestos removal/containment or waste handling.</p>
<p><b>Aircraft, watercraft and airports operated under contract</b>, including charter of aircraft or watercraft by your Entity or by another party in performance of work for your Entity.</p> <p><i>[Reminder: Your entity's primary liability insurance or risk pool program probably does not cover aircraft or airports. If you don't transfer the risk, your Entity could be totally responsible for a loss.]</i></p>	<p><b>Exhibit 1</b> may be appropriate if additional specialized liability insurance requirements are added. For aviation exposures, limits should be \$100 million or more. If the tenant is a marina operator or boat or airplane repairer, marina operator or ship repairer's or hangar keeper's liability is required. Limits should be large enough to cover the value of the most expensive object in the tenant's custody and 3 or 4 surrounding objects.</p>
<p><b>Leases for tenants and concessionaires</b> including food and beverage concessions, gift shops, office space tenants, child care centers, senior centers, and other space rental to lessees who have full-time or part-time employees.</p>	<p><b>Exhibit 3</b> can be used if no autos are used or commercially parked on the premises. If autos are used or parked, <b>Exhibit 1</b> should be used. If the tenant's activities include valet parking, with or without a fee, or servicing of automobiles, <b>Exhibit 1</b> may need to be supplemented by additional coverage called garagekeeper's legal liability. The required limit for this coverage should be equal to the value of the maximum number of automobiles that may be in the tenant's custody.</p>
<p><b>Vendors</b>, including vendors who supply equipment or other products to your Entity and who do not perform other functions, such as installation or maintenance.</p>	<p><b>Exhibit 4</b> can be used.</p>
<p><b>Space rental</b>, including short-term space rental for special occasions to groups who have no employees, such as club functions, weddings, dances, picnics or social dinners, crafts exhibitions or classes, animal shows and recreational activities, including baseball and football.</p>	<p><b>Exhibit 7</b> may be used.</p> <p><i>[Reminder: A special events policy is available to public entities. Contact your risk management department for details.]</i></p>
<p><b>Transportation of Hazardous Materials</b></p>	<p>Use <b>Exhibit 6</b>.</p>

**PLEASE NOTE:**

Non-insurance sections of the contract are also very important to the risk management process. At a minimum, always review the “scope of work” and “indemnification” sections of a contract. If the contractor’s insurance does not cover all of their indemnity exposures under the contract, it is its responsibility to obtain the necessary coverages to satisfy its agreement with your Entity.

Always remember that insurance is only one way that the contractor can indemnify your Entity. There should always be a section in the contract that states that the lack of insurance does not negate the contractor’s obligations under the contract. We recommend that the manual user consult with their Entity’s attorney for specific language for this section’s wording. Make sure your indemnity language is strong, and if the contractor does not carry sufficient or correct insurance to cover its obligations to your Entity, make certain it has assets to indemnify those uninsured or underinsured areas.

Sample Instructions for the Contractor, to be included as an attachment with the applicable Insurance Requirements

**INSURANCE REQUIREMENTS INSTRUCTION FORM**

Contractor shall provide its insurance broker(s)/agent(s) with a copy of the attached insurance requirements and request that they provide Certificates of Insurance complete with copies of all required endorsements and/or applicable policy language to:

**Entity Information (Certificate Holder and/or Additional Insured):**

**Name:**

**Address:**

**Contact person:**

**Phone number:**

**Email:**

**Description of Operations/Location(s)/Vehicles:**

\_\_\_\_\_

**Dates of required coverage:** \_\_\_\_\_

**Special Instructions:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Exhibit 1:****INSURANCE REQUIREMENTS FOR MOST CONTRACTS****(Not for Professional Services or Construction Contracts)**

Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder and the results of that work by the Contractor, his agents, representatives, employees or subcontractors.

**MINIMUM SCOPE AND LIMIT OF INSURANCE**

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office (ISO) Form CG 00 01 12 07 covering CGL on an “occurrence” basis, including products-completed operations, personal & advertising injury, with limits no less than **\$2,000,000** per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. **Automobile Liability:** ISO Form Number CA 00 01 covering any auto (Code 1), or if Contractor has no owned autos, hired, (Code 8) and non-owned autos (Code 9), with limit no less than **\$1,000,000** per accident for bodily injury and property damage.
3. **Workers’ Compensation:** as required by the State of California, with Statutory Limits, and Employer’s Liability Insurance with limit of no less than **\$1,000,000** per accident for bodily injury or disease.
4. **Professional Liability (Errors and Omissions):** Insurance appropriate to the Contractor’s profession, with limit no less than \$1,000,000 per occurrence or claim, \$2,000,000 aggregate. *(If applicable – see footnote next page)*

If the contractor maintains higher limits than the minimums shown above, the Entity requires and shall be entitled to coverage for the higher limits maintained by the contractor.

**Other Insurance Provisions**

The insurance policies are to contain, or be endorsed to contain, the following provisions:

***Additional Insured Status***

The Entity, its officers, officials, employees, and volunteers are to be covered as insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Contractor’s insurance at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10 and CG 20 37 if a later edition is used).

### ***Primary Coverage***

For any claims related to this contract, the Contractor's insurance coverage shall be primary insurance as respects the Entity, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the Entity, its officers, officials, employees, or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.

### ***Notice of Cancellation***

Each insurance policy required above shall provide that coverage shall not be canceled, except after thirty (30) days' prior written notice (10 days for non-payment) has been given to the Entity.

### ***Waiver of Subrogation***

Contractor hereby grants to Entity a waiver of any right to subrogation which any insurer of said Contractor may acquire against the Entity by virtue of the payment of any loss under such insurance. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the Entity has received a waiver of subrogation endorsement from the insurer.

### ***Deductibles and Self-Insured Retentions***

Any deductibles or self-insured retentions must be declared to and approved by the Entity. The Entity may require the Contractor to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

### ***Acceptability of Insurers***

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Entity.

### ***Claims Made Policies (note – should be applicable only to professional liability, see below)***

If any of the required policies provide claims-made coverage:

1. The Retroactive Date must be shown, and must be before the date of the contract or the beginning of contract work.
2. Insurance must be maintained and evidence of insurance must be provided ***for at least five (5) years after completion of the contract of work.***
3. If coverage is canceled or non-renewed, and not replaced ***with another claims-made policy form with a Retroactive Date prior to*** the contract effective date, the Contractor must purchase "extended reporting" coverage for a minimum of ***five (5) years*** after completion of work.

### ***Verification of Coverage***

Contractor shall furnish the Entity with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. All certificates and endorsements are to be received and approved by the Entity before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Contractor's obligation to provide them. The Entity reserves the right to

require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

***Special Risks or Circumstances***

Entity reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

*Note: Professional liability insurance coverage is normally required if the Contractor is providing a professional service regulated by the state. (Examples of service providers regulated by the state are insurance agents, professional architects and engineers, doctors, certified public accountants, lawyers, etc.). However, other professional Contractors, such as computer or software designers, and services providers such as claims administrators, should also have professional liability. If in doubt, consult with your risk management or insurance advisors.*

**Exhibit 2:****INSURANCE REQUIREMENTS FOR PROFESSIONAL SERVICES**

Consultant shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Consultant, its agents, representatives, or employees.

**MINIMUM SCOPE AND LIMIT OF INSURANCE**

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office Form CG 00 01 covering CGL on an “occurrence” basis for bodily injury and property damage, including products-completed operations, personal injury and advertising injury, with limits no less than **\$1,000,000** per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. **Automobile Liability:** Insurance Services Office Form Number CA 0001 covering, Code 1 (any auto), or if Consultant has no owned autos, Code 8 (hired) and 9 (non-owned), with limit no less than **\$1,000,000** per accident for bodily injury and property damage.
3. **Workers’ Compensation** insurance as required by the State of California, with Statutory Limits, and Employer’s Liability Insurance with limit of no less than **\$1,000,000** per accident for bodily injury or disease.  
*(Not required if consultant provides written verification it has no employees)*
4. **Professional Liability (Errors and Omissions)** Insurance appropriate to the Consultant’s profession, with limit no less than **\$1,000,000** per occurrence or claim, \$2,000,000 aggregate.

If the Consultant maintains higher limits than the minimums shown above, the Entity requires and shall be entitled to coverage for the higher limits maintained by the contractor.

**Other Insurance Provisions**

**The insurance policies are to contain, or be endorsed to contain, the following provisions:**

***Additional Insured Status***

**The Entity, its officers, officials, employees, and volunteers are to be covered as insureds** on the auto policy with respect to liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of the Consultant; and on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Consultant including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Consultant’s insurance (at least as broad as ISO Form CG 20 10, 11 85 or both CG 20 10 and CG 23 37 forms if later revisions used).

***Primary Coverage***

For any claims related to this contract, the **Consultant's insurance coverage shall be primary** insurance as respects the Entity, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the Entity, its officers, officials, employees, or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.

***Notice of Cancellation***

Each insurance policy required above shall state that **coverage shall not be canceled, except after thirty (30) days' prior written notice** (10 days for non-payment) has been given to the Entity.

***Waiver of Subrogation***

Consultant hereby grants to Entity a waiver of any right to subrogation which any insurer of said Consultant may acquire against the Entity by virtue of the payment of any loss under such insurance. Consultant agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the Entity has received a waiver of subrogation endorsement from the insurer.

***Deductibles and Self-Insured Retentions***

Any deductibles or self-insured retentions must be declared to and approved by the Entity. The Entity may require the Consultant to provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

***Acceptability of Insurers***

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Entity.

***Claims Made Policies***

If any of the required policies provide coverage on a claims-made basis:

1. The Retroactive Date must be shown and must be before the date of the contract or the beginning of contract work.
2. Insurance must be maintained and evidence of insurance must be provided **for at least five (5) years after completion of the contract of work.**
3. If coverage is canceled or non-renewed, and not **replaced with another claims-made policy form with a Retroactive Date** prior to the contract effective date, the Consultant must purchase "extended reporting" coverage for a minimum of **five (5) years** after completion of contract work.

***Verification of Coverage***

Consultant shall furnish the Entity with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. All certificates and endorsements are to be received and approved by the Entity before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Consultant's obligation to provide them. The Entity reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

***Subcontractors***

Consultant shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein.

***Special Risks or Circumstances***

Entity reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

**Exhibit 3:**  
**INSURANCE REQUIREMENTS FOR LESSEES**

**(Not For Daily or Short Term Rentals)**

Lessee shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the Lessee's operation and use of the leased premises. The cost of such insurance shall be borne by the Lessee.

**MINIMUM SCOPE AND LIMIT OF INSURANCE**

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office Form CG 00 01 covering CGL on an "occurrence" basis, including property damage, bodily injury and personal injury with limits no less than **\$2,000,000** per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. **Workers' Compensation** insurance as required by the State of California, with Statutory Limits, and Employer's Liability Insurance with limits of no less than **\$1,000,000** per accident for bodily injury or disease. (for lessees with employees).
3. **Property insurance** against all risks of loss to any tenant improvements or betterments, at full replacement cost with no coinsurance penalty provision.

If the Lessee maintains higher limits than the minimums shown above, the Entity requires and shall be entitled to coverage for the higher limits maintained.

**Other Insurance Provisions:**

The policies are to contain, or be endorsed to contain, the following provisions:

1. For General Liability, the Entity, its officers, officials, employees, and volunteers are to be **covered as insureds** with respect to liability arising out of ownership, maintenance, or use of that part of the premises leased to the lessee.
2. The Lessee's insurance coverage shall be **primary insurance** as respects the Entity, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the Entity, its officers, officials, employees, or volunteers shall be excess of the Lessee's insurance and shall not contribute with it.
3. Each insurance policy required above shall contain, or be endorsed to contain, a waiver of all **rights of subrogation** against the Entity
4. Each insurance policy shall be endorsed to state that coverage shall not be canceled except after thirty (30) days' prior written notice (10 days for non-payment) has been given to the Entity.
5. The Property insurance shall **name the Entity as Loss Payee** as its interests may appear.

***Acceptability of Insurers***

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VII, unless otherwise acceptable to the Entity.

***Deductibles and Self-Insured Retentions***

Any deductibles or self-insured retentions must be declared to and approved by the Entity. At the option of the Entity, either: the Lessee shall obtain coverage to reduce or eliminate such deductibles or self-insured retentions as respects the Entity, its officers, officials, employees, and volunteers; or the Lessee shall provide a financial guarantee satisfactory to the Entity guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

***Verification of Coverage***

Lessee shall furnish the Entity with original certificates and amendatory endorsements or copies of the applicable policy language providing the insurance coverage required above. All certificates and endorsements are to be received and approved by the Entity before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Lessee's obligation to provide them. The Entity reserves the right to require complete, certified copies of all required insurance policies, including endorsements, required by these specifications, at any time.

***Waiver of Subrogation***

Lessee hereby grants to Entity a waiver of any right to subrogation which any insurer of said Lessee may acquire against the Entity by virtue of the payment of any loss under such insurance. This provision applies regardless of whether or not the Entity has received a waiver of subrogation endorsement from the insurer.

***Special Risks or Circumstances***

Entity reserves the right to modify these requirements at any time, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

**Exhibit 4:****INSURANCE REQUIREMENTS FOR VENDORS**

Vendor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with products and materials supplied to the Entity. The cost of such insurance shall be borne by the Vendor.

**MINIMUM SCOPE AND LIMIT OF INSURANCE**

Coverage shall be at least as broad as Insurance Services Office Commercial General Liability coverage (occurrence Form CG 00 01) and include products coverage.

*Minimum Limits of Insurance*

Vendor shall maintain limits no less than \$1,000,000 per occurrence for bodily injury and property damage, and an aggregate limit of \$2,000,000.

If the Vendor maintains higher limits than the minimums shown above, the Entity requires and shall be entitled to coverage for the higher limits maintained by the contractor.

*Deductibles and Self-Insured Retentions*

Any deductibles or self-insured retentions must be declared to and approved by the Entity. At the option of the Entity, either: the Vendor shall obtain coverage to reduce or eliminate such deductibles or self-insured retentions as respects the Entity, its officers, officials, employees, and volunteers; or the Vendor shall provide a financial guarantee satisfactory to the Entity guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

*Other Insurance Provisions*

The policy or policies are to contain, or be endorsed to contain, the following provisions:

1. The Entity, its officers, officials, employees, and volunteers are to be covered as insureds as respects products of the Vendor.
2. The Vendor's insurance coverage shall be primary insurance as respects the Entity, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the Entity, its officers, officials, employees or volunteers, shall be excess of the Vendor's insurance and shall not contribute with it.
3. Each insurance policy required by this clause shall state that coverage shall not be canceled, except after thirty (30) days prior written notice has been provided to the Entity.

*Acceptability of Insurers*

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Entity.

*Verification of Coverage*

Vendor shall furnish the Entity with original certificates and amendatory endorsements or copies of the applicable policy language providing the insurance coverage required above. All certificates and endorsements are to be received and approved by the Entity before work

commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Vendor's obligation to provide them. The Entity reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

*Waiver of Subrogation*

Vendor hereby grants to Entity a waiver of any right to subrogation which any insurer of said Vendor may acquire against the Entity by virtue of the payment of any loss under such insurance. Vendor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the Entity has received a waiver of subrogation endorsement from the insurer

*Special Risks or Circumstances*

Entity reserves the right to modify these requirements at any time, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

**Note:**

*Vendor Exceptions*

*There are a number of organizations/companies that provide services to your agencies that will not have formal contracts in place. These include but are not limited to, United Parcel Service, Federal Express, United States Postal Service, and for hire interstate truck lines as examples. Although each of these companies may provide vendor services to you, you typically will not require formal contracts and will not require evidence of insurance. All of the companies listed above are required to be licensed under the Department of Transportation rules and regulations which also require specific limits of insurance.*

## CHAPTER THREE

### CONSTRUCTION & ENVIRONMENTAL SERVICES

#### SUMMARY

*This chapter provides guidance for drafting insurance requirements for construction projects and environmental services.*

#### **Construction Contracts**

Construction contracts are often the largest and most complex agreements that your organization will create, most often with a formal and complex bidding process preceding the agreement. The potential for loss in construction related events can be devastating. The size and nature of most construction agreements give you a significant advantage in the negotiation process for requiring insurance. You need to carefully examine all of the exposures to risk in the construction agreement and then must require specific insurance for each exposure.

The discussion on construction agreements will provide a baseline for the majority of agreements that will be created for your organization. Discussion on the specifics of the project should occur early on in the design process. This will better position your Entity to develop your insurance requirements and provide the bidding contractors with all of the requirements before the bids are submitted. It should be made clear during the pre-bid meetings that your Entity has specific insurance requirements and contractors should be encouraged to contact their brokers/carriers as they are developing their bids. Your Entity should specifically advise bidding contractors that you will not accept change orders that are based on insurance costs that were not appropriately considered.

#### **What is a “Construction Contract”?**

The reader needs to be aware that the term “construction contract” has specific meaning as it relates to public entities, and there are a number of requirements and restrictions that relate to risk transfer and management of such contracts. One significant restriction is the extent to which a public entity may be held harmless for damages arising from construction contracts, as more fully explained in Appendix C. For purposes of this section, we refer you to the following California Civil Code section defining these contracts as they relate to the indemnity restrictions:

Civil Code 2783: As used in Sections 2782 and 2782.5, "construction contract" is defined as any agreement or understanding, written or oral, respecting the construction, surveying, design, specifications, alteration, repair, improvement, maintenance, removal of or demolition of any building, highway, road, parking facility, bridge, railroad, airport, pier or dock, excavation or other structure, development or other improvement to real or personal property, or an agreement to perform any portion thereof or any act collateral thereto, or to perform any service reasonably related thereto, including, but not limited to, the erection of all structures or performance of work in connection therewith, the rental of all equipment, all incidental transportation, crane and rigging service and other goods and services furnished in connection therewith.

## **Public Contract Codes**

A discussion of various State Public Contract Codes is beyond the scope of this manual, but the editors want to make the reader aware of certain common provisions, such as bonding requirements and written acknowledgement by the contractor of the requirement to provide workers' compensation or approved self-insurance, that impact the insurance requirements for construction projects. The reader who is regularly involved in managing the risks and/or insurance requirements for construction contracts should make themselves familiar with their Code's terms and conditions related to their type of entity and their typical public contracts.

## **Unique Construction Contract Provisions**

For purposes of this manual, we will provide an overview of insurance requirements that are generally unique to construction contracts and issues that one is likely to encounter in providing risk management oversight for them. These include:

- Surety Bonds,
- Builder's Risk or course of construction insurance,
- Consolidated insurance programs or wrap-ups,
- Higher Limits, and
- Extended Coverage/AI Status

We conclude this section with a discussion of environmental services contracts and hazards, including remediation and waste hauling, with sample insurance specifications and forms for reference.

## **Surety Bonds**

“Surety” is a three party contract wherein a person or entity agrees to be responsible for the contractual obligations of another should those obligations not be met.

A surety bond is a contractual agreement under which the surety company guarantees the performance of certain obligations of the principal (contractor) for the benefit of another (entity). In public works contracts, for example, the surety company guarantees the completion of the construction project by the contractor for the benefit of the public entity.

The surety company stands behind the bonded contractor and guarantees the completion of the bonded work. In this way, the surety bond is a risk transfer technique similar to but different than insurance. A bond differs from insurance in two fundamental ways: (1) the number of parties to the agreement, and (2) the surety's right of indemnity from the contractor, if they fail.

Insurance has two parties to the insuring agreement: the insurer and the insured (policyholder). A bond, however, has three parties to the surety agreement: the bonding company (surety), the entity being bonded (principal), and the entity who benefits in the event of a bonded default (obligee).

A surety company also has the right of indemnity from the principal. If a surety is called upon to make a payment on a bond because the principal failed to meet a bonded obligation

to the obligee, the surety may recover the amount of loss from the principal (also referred to as the obligor).

Surety bonds are designed to help the obligee ensure that the contractor will complete the job in accordance with the contract. If a bonded contractor defaulted on any obligation of a bonded job, the surety may seek to recover any amounts it paid to the Obligee (the Entity) from the principal (the bonded contractor). Thus, the bonded contractor has a punitive incentive through the legal constraints of the bond to complete the work expected by the obligee.

Further, surety companies carefully underwrite applicants for bonds by examining the contractor's managerial and financial ability to undertake and complete a job. Thus, the requirement for surety bonds also serves to eliminate truly unqualified contractors from the bid process.

All public works contracts should include a requirement that the contractor furnish contract bonds, but you may choose to exercise discretion for certain types of jobs that have inconsequential cost or risk of other harm should a contractor fail to complete the work.

The surety bonds related to public work contracts include: Bid Bond, Performance Bond and Payment Bonds and Completion Bonds. Collectively, they are referred to as Contract Bonds.

A *Bid Bond* is a guarantee by the surety that the bidder for a public works contract will undertake the job at the quoted price and replace the bid bond with a performance bond.

A *Performance Bond* is a guarantee that if the bonded contractor fails to complete the bonded job as quoted, the surety will assume the contractor's financial responsibility to have the work completed.

A *Payment Bond* or Labor and Material Bond is a guarantee that the contractor will pay all the bills incurred on the work, as provided in the lien laws (subcontractors, suppliers, laborers).

A *Subdivision or Completion Bond* is a guarantee that if a developer or contractor fails to complete improvements required in a contract, the Obligee will assume the obligation.

The contractor should obtain a Performance and Payment Bond with penalties equal to one hundred percent (100%) of the contract price as determined from the prices in the bid form. The bond amount may be adjusted from time to time as necessary to cover and satisfy all payment obligations arising from the contract.

The contractor should file the required bond with the public entity prior to or simultaneous with the execution of the contract.

Although bonds are most commonly used in construction agreements, there are specific agreements where performance bonds may be used by your Entity. Purchase agreements for specific items such as software development or other products specifically engineered by the vendor may incorporate language requiring a performance/material bond.

Performance and Payments Bonds should be submitted on forms provided by the public entity. The surety should possess a minimum rating from A. M. Best Company of A:VII. Also, the surety or co-sureties should be listed as an acceptable surety on federal bonds by

the United States Department of the Treasury, <http://www.fms.treas.gov/c570/c570.html>, subject to the maximum amount shown in the listing. If co-sureties are used, their bonds should be on a joint and several basis. In California, the only requirement by law is that the surety needs to be an admitted carrier with a valid surety license.

### **Builders Risk Insurance (Course of Construction)**

Insurance for property under construction is called “Builder’s Risk” or “Course of Construction” insurance. This type of insurance protects the interests of both the owner and contractor by covering property under construction as well as equipment and materials to be installed. Pricing takes into account changing values as construction nears completion.

In most cases the contractor provides builder’s risk insurance on construction projects as a part of their construction services, and the recommended default position in the insurance specifications require the contractor to provide it to protect both their and your interest in property while in the course of construction. However, many public entities have Builder’s Risk coverage as part of their own property policy, and many larger agencies, or those in large programs may be able to obtain broader or less expensive coverage from their own insurer. For large projects it’s worth having a conversation with your broker about this and perhaps have the contractor provide a bid with and without the Builder’s Risk cover in order to compare terms and pricing.

Items to consider include:

- Perils

Coverage should be written on an “all risk” (“special”) basis, and the perils of earthquake and flood should be **considered** for inclusion, but can be problematic. Earthquake coverage is optional based on the needs and location of the project. For example, earthquake coverage must be included if a grant funding the project or financing arrangements (i.e., bonds) require it.

- Deductibles

Deductibles should be reasonable in relation to the financial ability of the parties and the size of the project.

- Property Covered

At a minimum, the insurance should cover the full insurable value of the improvements. It may, at your Entity’s option, also include consequential loss insurance, if your Entity could be harmed financially because of delay due to an insured loss. Coverage is available for both loss of revenue (rents or earnings) and for additional interest costs or expenses.

- Loss Payee Status

Your Entity should be named in the policy as a Loss Payee, to protect your interests with respect to the repair or replacement of any damaged property or other amounts payable under the policy. This means that any payment will have to include your Entity as a payee or otherwise have your written authority to make payment to someone else. Since both your entity and the contractor have an interest in the

property while it's being constructed, payment might also include the contractor and/or other party making repairs.

- Valuation Basis

Coverage can be written based on the completed value of the project or by reporting changes in value on a monthly basis. Usually, the former method is preferred as it is less complex, and there is less of a chance of error resulting in inadequate insurance.

**As builder's risk insurance is written specifically for the project, you should receive a complete copy of the policy.** It is not necessary to provide sample endorsement or certificate forms in your specifications, but requirements for the coverage should be clearly stated in the bid documents.

### **Installation Floater**

Insurance coverage for property (usually equipment) being installed by a contractor is called an "Installation Floater". Essentially, it is a specialized type of builders risk coverage that is often written on the same form used to provide builders risk coverage, but for projects where no real property construction is taking place.

### **Consolidated Insurance Programs (Wrap-Ups)**

Construction contracts may vary widely in scope and in degree of risk involved. Simple remodeling projects or building repairs can be addressed through the appropriate specifications as presented in **Exhibits 1 or 5**. Larger projects may require more sophisticated insurance techniques.

Large-scale construction projects involve numerous contractors, subcontractors, consultants, and other parties, all subject to a variety of risks arising out of the work. Because of the numerous parties involved, assuring adequate insurance protection for all concerned poses certain technical and logistical problems. An approach often advocated to deal with these complexities is called the Consolidated Insurance Program (CIP).

A CIP (often referred to as a "wrap up") usually involves procurement by the project owner (OCIP) or general contractor (CCIP) of certain insurance policies which protect both the project owner and various contractors and subcontractors involved in the construction. These coverages may include general liability, professional liability, workers' compensation, umbrella liability, and builder's risk. The owner or general contractor arranges for safety and loss control services, if any, beyond those provided by the insurer. A CIP works best on large projects where there are a number of contractors, where the project is labor intensive, where construction takes place in a limited geographical area, and where the owner or general contractor is committed to safety and loss control, including top quality claims management.

While entire books can be written on the advantages and disadvantages of CIP's, theoretically, the CIP concept should provide for cost savings to the owner due to purchasing economies of scale, cash flow advantages from controlling premium payments, potential for dividend returns and potential for savings due to coordinated loss control. In practice however, a number of factors can reduce or eliminate these potential savings. Some of these factors may include:

- Insufficient contractor motivation to control losses.

Many contractors do not realize that workers' compensation losses on a CIP project will affect the contractor's experience modifier. The contractor may therefore be more highly motivated to complete the project ahead of schedule or under budget than to pay attention to safety.

- Inclusion of contractor insurance charges.

Depending on the competitive environment, contractors may include the cost of insurance in its bid pricing. Additionally, the contractor may feel it necessary to charge for difference in conditions coverage to fill any gaps in the owner's insurance program as it applies to the contractor.

- Inclusion of non project-related claims.

If a contractor has employees assigned to the project who also work on other projects for the contractor, it is possible that workers' compensation claims not related to the project may show up on the owner's loss runs.

- Increased administrative costs.

In order to obtain the cost-saving benefits, the owner of a CIP project must provide superior loss control services either through staff or contractors. Keeping track of various workers' compensation insurance policies and other paperwork adds administrative expense to the project.

To a certain extent, all of the above factors can be controlled. If properly administered, the CIP concept should generate cost savings, some of which may be realized by the project owner. Because of the variables cited above and other factors, precision in estimating savings usually is not possible.

Other than possible savings, reasons for using a CIP include better control of claims involving potential multiple defendants, and the comfort of knowing that adequate insurance is in place. Because there is a single policy for liability insurance, limits and breadth of coverage under a CIP are known and uniform, rather than a patchwork quilt of different insurance that might be purchased by the various contractors. A CIP eliminates much of the need for establishing insurance specifications in each contract with each contractor, as the owner provides the insurance. Also, the paperwork burden of keeping up with certificates is greatly reduced.

- **Other Provisions of the Construction Contract Insurance Requirements.**

- **Limits:** the recommended minimum limit for general liability is \$5 million per occurrence. The higher limit is appropriate for general contractors on any new construction or major remodel projects. Subcontractors in areas of higher risk, such as electric, roofing, or plumbing work, should have limits above the standard minimum of \$1 million (or \$2 million as recommended in this IRIC). Please refer to the chart in Appendix D, for a reference to suggested minimum limits for a variety of construction and other risks.

- **Extended Coverage and Additional Insured Status**

For many types of construction projects, the reader is advised to consider requiring that the contractor maintain general liability coverage **and** maintain your entity's status as an additional insured for a period of time after completion. This is due to the fact that defects in construction may not become evident or cause damage for many years after completion, and you want to be certain the contractor has coverage naming you as an additional insured when that damage first occurs.

For example, your entity hires a contractor to replace a sewer line. Four years later, a neighboring homeowners file a claim alleging negligent construction of the line has caused their patios to shift and crack. The contractor's policy at the time the damages first began, say three years after construction and a heavy rain, is the first policy to respond to the loss. While your entity may be able to rely on the hold harmless agreement, and the contractor may have insurance at that time, you will not have the added protection of additional insured status.

- For new and larger construction projects, requesting coverage for up to 5 to 7 years, or even longer, is recommended. The Instruction Form to be used for the insurance specifications has space for requesting coverage beyond the construction completion. As a minimum, and for smaller projects, your entity should request additional insured status until the expiration of the policy in force when the project is completed.

- **Design/Build Contracts**

For contracts with construction risk we have added coverage requirements for professional liability. The professional liability coverage is necessary for "design/build" contracts where the contractor is expected to provide engineering and architectural services.

### **Environmental Contractors and Consultants**

Environmental issues are becoming an increasing concern and responsibility of municipal risk managers both as the owner of potentially contaminated property and as the jurisdiction responsible for the permit process. Entities are increasingly recognizing their exposure as generators and transporters of hazardous materials and pollutants. Entities are involved in issuing easement permits for access to their property involving both groundwater and soil contamination testing and potential cleanup of pollution generators within their communities.

**Exhibit 6** (at the end of the chapter) addresses the availability of coverage for the unique risks associated with environmental issues in today's insurance market. When testing and cleanup are either mandated or desired, a common public goal must be met. There are very few insurance companies underwriting these unusual risks, and they are reluctant to amend the policy conditions. Careful research and compromise on the part of the risk manager is recommended.

Many times the standard insurance requirements as set forth in other sections of this manual may not be achievable for environmental contractors and/or consultants. An example is the issuance of encroachment permits relating to environmental work. Frequently contractors and consultants are not made aware of the Entity's requirements when responding to the private

sector, and many times the contractor's insurance companies will not comply with standard requirements. Therefore, these standards must be flexible to allow for compliance by the few professional firms experienced in environmental testing and cleanup, since they will not typically be aware of your Entity's specific requirements until they have been hired by the private sector firm to conduct testing. Without preventing the needed testing or cleanup, the Entity must recognize how to transfer risk with the best protection for the Entity while still reaching the common goal.

**Exhibit 6** contains insurance requirements appropriate for environmental contractors and/or consultants. If you cannot verify the A.M. Best rating of the insurance company, or if the coverage is written by a Risk Retention Group or captive insurance company, you may want to check with your insurance advisor for further information about the market.

It is fairly obvious that environmental remediation, asbestos abatement, and other hazardous material operations involve exposures that require pollution legal liability coverage, but some contracts have pollution exposures that are not in the primary scope of work. For example, materials recovery/recycling facilities are rife with hazardous materials exposures, as are landfill operations. Road construction can also include risks of contamination to waterways from runoff or accidents involving hazardous substances.

Note that pollution policies now come in many formats such as:

- First party clean up of the insured's property
- Third party clean up and bodily injury if the insured's pollutants impact other properties
- Cost Cap coverage to protect the insured from cost overruns or surprises for cleanup of properties with known pollutants
- Landfill closure coverage – to comply with Federal financial responsibility requirements

The areas of coverage are as varied as the exposures and the pollution liability and clean up insurance market is now well developed to respond to the insured's needs – but for a price!

**Note:** Automobile, Contractors Pollution Liability, Asbestos Pollution, and/or Errors & Omissions insurance carriers may not name the Entity as additional insured. If the Entity cannot be named as additional insured, you should request a letter from the insurance company confirming their position.

### **Transporters of Hazardous Materials and Wastes**

Entities are increasingly recognizing their exposure as generator and transporter of hazardous materials and pollutants. It is important to know that all motor carriers and drivers involved in transportation of hazardous materials must comply with requirements contained in federal and state regulations and must apply for and obtain a hazardous materials transportation license. Additionally, transporters of hazardous wastes are required to carry the MCS-90.

The MCS-90 is a required endorsement to a business automobile policy for hazardous material/waste transporters. It originated in response to the Motor Carrier Act of 1980. Its purpose is to ensure that funds are available for damages arising from a trucking accident that

involves hazardous materials. However, it only applies to vehicles subject to financial assurance requirements of the Act; that is, which are subject to Federal jurisdiction. It may not provide coverage in situations where substances are transported that do not specifically fall within the definitions contained in the Act.

What is a hazardous material? The California Water Bill defines hazardous material as “any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant presence or potential hazard to human health and safety, or to the environment.” Hazardous materials include, but are not limited to, hazardous substances and hazardous wastes.

A hazardous waste is a waste or combination of wastes that because of its quantity, concentration, or physical, chemical, or infectious characteristics may do either of the following:

- Cause or significantly contribute to an increase in serious irreversible illness or death; or
- Pose a substantial hazard to human health or the environment when improperly treated, stored, transported or disposed of.

A hazardous substance is any substance or chemical product for which any of the following applies:

- The substance is listed as hazardous by the US Department of Transportation;
- The substance is listed on the “Director’s List of Hazardous Substances,” which is maintained by CalOSHA;
- The substance is listed as radioactive by the Nuclear Regulatory Commission; or
- The manufacturer or producer is required to prepare a Material Safety Data Sheet (MSDS) for the substance.

Even if a contract does not involve hauling waste which is statutorily defined as hazardous, the Entity may consider the waste a hazard and should be requiring ISO Form CA 99 48 03 06 – Pollution Liability – Broadened Coverage for Covered Autos. This form should be required of municipal solid waste haulers, construction debris roll off services and haulers of other items which may be caustic but not defined as falling within the statute.

**Exhibit 6** contains insurance requirements appropriate for environmental contractors and/or consultants. These same insurance requirements are appropriate for transporters of hazardous wastes.

**Exhibit 5:****INSURANCE REQUIREMENTS FOR CONSTRUCTION CONTRACTS**

Contractor shall procure and maintain for the duration of the contract, *and for x years thereafter*, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees, or subcontractors.

**MINIMUM SCOPE AND LIMIT OF INSURANCE**

Coverage shall be at least as broad as:

1. **Commercial General Liability:** Insurance Services Office Form CG 00 01, including products and completed operations, with limits of no less than **\$5,000,000** per occurrence for bodily injury, personal injury, and property damage. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. **Automobile Liability:** Insurance Services Office Form Number CA 0001 covering Code 1 (any auto), with limits no less than **\$5,000,000** per accident for bodily injury and property damage.
3. **Workers' Compensation** insurance as required by the State of California, with Statutory Limits, and Employers' Liability insurance with a limit of no less than \$1,000,000 per accident for bodily injury or disease.
4. **Builder's Risk** (Course of Construction) insurance covering all risks of loss less policy exclusions, with limits equal to the completed value of the project and no coinsurance penalty provisions.
5. **Surety Bonds** as described below.
6. **Professional Liability** (if Design/Build), with limits no less than \$1,000,000 per occurrence or claim, and \$2,000,000 policy aggregate.
7. **Contractors' Pollution Legal Liability** and/or Asbestos Legal Liability and/or Errors and Omissions (if project involves environmental hazards) with limits no less than \$1,000,000 per occurrence or claim, and \$2,000,000 policy aggregate.

***Deductibles and Self-Insured Retentions***

Any deductibles or self-insured retentions must be declared to and approved by the Entity. At the option of the Entity, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the Entity, its officers, officials, employees, and volunteers; or the Contractor shall provide a financial guarantee satisfactory to the Entity guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

### *Other Insurance Provisions*

The insurance policies are to contain, or be endorsed to contain, the following provisions:

1. **The Entity, its officers, officials, employees, and volunteers are to be covered as insureds** on the CGL and auto policies with respect to liability arising out of automobiles owned, leased, hired, or borrowed by or on behalf of the Contractor; and with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Contractor's insurance (at least as broad as ISO Form CG 20 10, 11 85 or both CG 20 10 and CG 23 37 forms if later revisions used).
2. For any claims related to this project, the **Contractor's insurance coverage shall be primary** insurance as respects the Entity, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the Entity, its officers, officials, employees, or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.
3. Each insurance policy required by this clause shall be endorsed to state that **coverage shall not be canceled except after thirty (30) days prior written notice** (10 days for non-payment) has been provided to the Eity.

### *Builder's Risk (Course of Construction) Insurance*

Contractor may submit evidence of Builder's Risk insurance in the form of Course of Construction coverage. Such coverage shall **name the Entity as a loss payee** as their interest may appear.

If the project does not involve new or major reconstruction, at the option of the Entity, an Installation Floater may be acceptable. For such projects, a Property Installation Floater shall be obtained that provides for the improvement, remodel, modification, alteration, conversion or adjustment to existing buildings, structures, processes, machinery and equipment. The Property Installation Floater shall provide property damage coverage for any building, structure, machinery or equipment damaged, impaired, broken, or destroyed during the performance of the Work, including during transit, installation, and testing at the Entity's site.

### *Claims Made Policies (if applicable – usually only Professional Liability or Pollution /Asbestos)*

If any coverage required is written on a claims-made form:

1. The retroactive date must be shown, and must be before the date of the contract or the beginning of contract work.
2. Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of contract work.
3. If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the contract effective date, the Contractor

must purchase extended reporting period coverage for a minimum of five (5) years after completion of contract work.

4. A copy of the claims reporting requirements must be submitted to the Entity for review.
5. If the services involve lead-based paint or asbestos identification/remediation, the Contractors Pollution Liability policy shall not contain lead-based paint or asbestos exclusions. If the services involve mold identification/remediation, the Contractors Pollution Liability policy shall not contain a mold exclusion, and the definition of Pollution shall include microbial matter, including mold.

#### ***Acceptability of Insurers***

Insurance is to be placed with insurers with a current A.M. Best rating of no less than A: VII, unless otherwise acceptable to the Entity.

#### ***Waiver of Subrogation***

**Contractor hereby agrees to waive rights of subrogation which any insurer of Contractor may acquire** from Contractor by virtue of the payment of any loss. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation. **The Workers' Compensation policy shall be endorsed with a waiver of subrogation** in favor of the Entity for all work performed by the Contractor, its employees, agents and subcontractors.

#### ***Verification of Coverage***

Contractor shall furnish the Entity with original certificates and amendatory endorsements, or copies of the applicable insurance language, effecting coverage required by this contract. All certificates and endorsements are to be received and approved by the Entity before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Contractor's obligation to provide them. The Entity reserves the right to require complete, certified copies of all required insurance policies, including endorsements, required by these specifications, at any time.

#### ***Subcontractors***

Contractor shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein.

#### ***Surety Bonds***

Contractor shall provide the following Surety Bonds:

1. Bid bond
2. Performance bond
3. Payment bond
4. Maintenance bond

The Payment Bond and the Performance Bond shall be in a sum equal to the contract price. If the Performance Bond provides for a one-year warranty a separate Maintenance Bond is not necessary. If the warranty period specified in the contract is for longer than one year a Maintenance Bond equal to 10% of the contract price is required. Bonds shall be duly executed by a responsible corporate surety, authorized to issue such bonds in the State of California and secured through an authorized agent with an office in California.

***Special Risks or Circumstances***

Entity reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other circumstances.

**Exhibit 6:****INSURANCE REQUIREMENTS FOR ENVIRONMENTAL CONTRACTORS  
AND/OR CONSULTANTS**

Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder and the results of that work by the Contractor, his agents, representatives, employees, or subcontractors. With respect to General Liability, Errors & Omissions, Contractors Pollution Liability, and/or Asbestos Pollution Liability, coverage should be maintained for a minimum of five (5) years after contract completion.

**MINIMUM SCOPE AND LIMIT OF INSURANCE**

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office Form CG 00 01 07 04 covering CGL on an “occurrence” basis, including products-completed operations, property damage, bodily injury, & personal injury, with limits no less than **\$2,000,000** per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. **Automobile Liability:** Insurance Services Office Form Number CA 0001 covering any auto (Code 1), or if Contractor has no owned autos, hired (Code 8) and non-owned (Code 9) autos, with limit no less than **\$1,000,000** per accident for bodily injury and property damage.
3. **Workers’ Compensation** insurance as required by the State of California, with Statutory Limits, and Employer’s Liability Insurance with limit of no less than \$1,000,000 per accident for bodily injury or disease.
4. Contractors Pollution Liability and/or Asbestos Pollution Liability and/or Errors & Omissions applicable to the work being performed, with a limit no less than \$1,000,000 per claim or occurrence and \$2,000,000 aggregate per policy period of one year,

*Deductible and Self Insured Retentions*

Any deductibles or self-insured retentions must be declared to and approved by the Entity. At the option of the Entity, the Contractor shall provide coverage to reduce or eliminate such deductibles or self insured retentions as respects the Entity, its officers, officials, employees, and volunteers; or the Contractor shall provide evidence satisfactory to the Entity guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

*Other Insurance Provisions*

- A. The General Liability, Automobile Liability, Contractors Pollution Liability, and/or Asbestos Pollution policies are to contain, or be endorsed to contain, the following provisions:

1. The Entity, its officers, officials, employees, and volunteers are to be covered as insureds with respect to liability arising out of automobiles owned, leased, hired, or borrowed by or on behalf of the Contractor; and with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Contractor's insurance (at least as broad as ISO Form CG 20 10, 11 85 or both CG 20 10 and CG 20 37 forms if later revisions used).
  2. For any claims related to this project, the Contractor's insurance coverage shall be primary insurance as respects the Entity, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the Entity, its officers, officials, employees, agents, or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.
  3. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be canceled except after thirty (30) days prior written notice has been given to the Entity.
- B. The Automobile Liability policy shall be endorsed to include Transportation Pollution Liability insurance, covering materials to be transported by Contractor pursuant to the contract. This coverage may also be provided on the Contractors Pollution Liability policy.
- C. If General Liability, Contractors Pollution Liability and/or Asbestos Pollution Liability and/or Errors & Omissions coverages are written on a claims-made form:
1. The retroactive date must be shown, and must be before the date of the contract or the beginning of contract work.
  2. Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of the contract of work.
  3. If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the contract effective date, the Contractor must purchase an extended period coverage for a minimum of five (5) years after completion of contract work.
  4. A copy of the claims reporting requirements must be submitted to the Entity for review.
  5. If the services involve lead-based paint or asbestos identification / remediation, the Contractors Pollution Liability shall not contain lead-based paint or asbestos exclusions. If the services involve mold identification / remediation, the Contractors Pollution Liability shall not contain a mold exclusion and the definition of "Pollution" shall include microbial matter including mold.

#### *Acceptability of Insurers*

Insurance is to be placed with insurers with a current A.M. Best rating of no less than A:VII if admitted in the State of California. If Contractors Pollution Liability, Asbestos Pollution and/or Errors & Omissions coverages are not available from an admitted insurer, the

coverage may be written by a non-admitted insurance company. A non-admitted company should have an A.M. Best rating of A:X or higher. Exception may be made for the California State Compensation Insurance Fund if not rated.

*Verification of Coverage*

Contractor shall furnish the Entity with original certificates and amendatory endorsements, or copies of the applicable insurance language, effecting coverage required by this contract. All certificates and endorsements are to be received and approved by the Entity before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Contractor's obligation to provide them. The Entity reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

*Waiver of Subrogation*

Contractor hereby grants to Entity a waiver of subrogation which any insurer may acquire against Entity, its officers, officials, employees, and volunteers, from Contractor by virtue of the payment of any loss. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation but this provision applies regardless of whether or not the Entity has received a waiver of subrogation endorsement from the insurer.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the Entity for all work performed by the Contractor, its employees, agents, and subcontractors.

*Subcontractors*

Contractor shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein.

*Special Risks or Circumstances*

Entity reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

## Performance Bond

BOND NO. \_\_\_\_\_  
PREMIUM: \_\_\_\_\_

WHEREAS, The \_\_\_\_\_, (hereinafter designated as "Obligee") and \_\_\_\_\_ (hereinafter designated as "Principal") have entered into an agreement whereby principal agrees to install and complete certain designated public improvements, which said agreement, dated \_\_\_\_\_, and identified as project \_\_\_\_\_ is hereby referred to and made a part hereof; and

WHEREAS, Said principal is required under the terms of said agreement to furnish a bond for the faithful performance of said agreement;

NOW, THEREFORE, We, the principal and \_\_\_\_\_ as surety, are held and firmly bound unto the hereinafter called "The Obligee," in the penal sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_) lawful money of the United States for the payment of which sum well and truly to be made, we bind ourselves, our heirs, successors, executors and administrators, jointly and severally firmly by these presents.

The condition of this obligation is such that if the above bound principal, his or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and provisions in the said agreement and any alteration thereof made as therein provided, on his or their part, to be kept and perform and at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the Obligee, its officers, agents and employees, as therein stipulated, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

As part of the obligation secured hereby and in addition to the face amount specified therefore, there shall be included costs and reasonable expenses and fees, including reasonable attorney's fees, incurred by county in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

The surety hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the agreement or to the work to be performed thereunder or the specification accompanying the same shall in any wise affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the agreement or to the work or to the specifications.

IN WITNESS WHEREOF, this instrument has been duly executed by the principal and surety above named, on

By \_\_\_\_\_  
PRINCIPAL

By: \_\_\_\_\_  
PRINCIPAL

By: \_\_\_\_\_  
ATTORNEY-IN-FACT

**Payment Bond Public Works**

BOND NO.: \_\_\_\_\_

KNOW ALL MEN BY THESE PRESENTS, That we, \_\_\_\_\_  
Principal, and \_\_\_\_\_, incorporated under the laws of the State  
of \_\_\_\_\_ and authorized to execute bonds and undertakings as sole surety, as  
Surety, are held and firmly bound unto any and all persons named in California Civil Code  
Section 1181 whose claim has not been paid by the contractor, company or corporation, in  
the aggregate total of \_\_\_\_\_ dollars (\$ \_\_\_\_\_ ), for the payment  
whereof, well and truly to be made, said Principal and Surety bind themselves, their heirs,  
administrators, successors and assigns, jointly and severally, firmly by these present.

The Condition of the foregoing obligation is such that; whereas the above bounden  
Principal has entered into a contract, dated \_\_\_\_\_, with the  
\_\_\_\_\_ to do the following work, to-wit:

NOW, THEREFORE, if the above bounden Principal contractor, person, company or  
corporation, or his or its subcontractor, fails to pay any claimant named in Section 3181 of  
the Civil Code of the State of California, or amounts due under the Unemployment Insurance  
Code, with respect to work or labor performed by any such claimant, that, the Surety on this  
bond will pay the same, in an amount not exceeding the aggregate sum specified in this bond,  
and also in case suit is brought upon this bond, a reasonable attorney's fee, which shall be  
awarded by the court to the prevailing party in said suit, said attorney's fee to be taxes as  
costs in said suit.

This bond shall inure to the benefit of any person named in Section 3181 of the Civil  
Code of the State of California so as to vie a right of action to them or their assignees in any  
suit brought upon this bond.

This bond is executed and filed to comply with the provisions of the act of  
Legislature of the State of California as designated in Civil Code Sections 3247-3252  
inclusive, and all amendments thereto.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

BY \_\_\_\_\_

BY \_\_\_\_\_  
ATTORNEY-IN-FACT

## CHAPTER FOUR SPECIAL SITUATIONS

### SUMMARY

*This chapter covers a number of situations in which special commercial insurance should be required or when personal lines insurance may be acceptable.*

#### **Cyber Risks & Electronic Data Processing (EDP)**

As our reliance on computer technology and use of the Internet continues to grow and change, so, too, do the risks of loss and potential liability arising from such use and from services provided to or from third parties. These risks include loss of stored data, theft of data, disruption of network capabilities, and disclosure of private information. Given the relatively new and evolving nature of these risks, the ability to transfer them via traditional insurance or contractual indemnity has been limited. However, as the nature of the risks have become more known, techniques and insurance products have emerged to treat them.

These risks and the related management techniques can be broken down into first party risks, related to damages directly to an entity's own systems or data, and third party risks related to liability to others for breaches of security that may lead to loss of privacy or potential for identity theft. The reader is advised to review his or her own insurance policies and/or discuss these risks with his or her insurance advisor to determine the extent to which his or her current program covers his or her entity for these risks. Standard property and liability policies generally provide little to no protection for such risks, while standard crime policies may offer some protection. Customized policies are also offered to cover both the first and third party risks an entity may face.

For purposes of drafting hold harmless language and insurance requirements for contracts with third parties who may provide data processing services to your entity, the reader is advised to work closely with his or her legal, technical, and insurance advisors to ensure the broadest possible indemnity, not limited to bodily injury or property damage, and ensure that the contractor has the appropriate professional or "cyber" liability insurance to cover breaches of data security. Beyond that, questions should be asked about the contractor's data security procedures, including whether or not they have been audited to SAS 70 standards regarding their controls over information technology and related processes. In drafting the agreement, it is suggested that the following points be taken into consideration:

- Remember that at some point in the future, the entity's agreement with a data system vendor will likely end and that the entity will want access to all data in a usable format within a reasonable period of time. Returned data should include tables and indexes, number of records and any other useful information so that the entity can utilize the data. We suggest adding a special termination clause that allows the entity

- to recover its data for a special fee, without regard to any other dispute that may be pending with the vendor.
- Require that the vendor notify the entity of a breach even if no data was lost.
  - Require that data be backed up in a secure fashion and that entity have access to back ups.
  - Require minimum response and recovery time.
  - Require an independent audit of operations.
  - Require the standard insurance requirements plus add a requirement for some form of “cyber liability coverage” that includes
    - Security and privacy liability
    - Media liability
    - Business interruption and extra expense
    - Cyber extortion

### **Teaching, Coaching, and Childcare**

An often overlooked exposure for public entities that run day care, provide after school programs, or provide coaches for recreational activities is the potential for claims of abuse or molestation. It’s a sad fact of life for those in the teaching professions and an exposure that is not covered by standard general liability policies. A specialized policy form, often referred to as Educators Legal Liability (ELL) insurance is recommended.

ELL is designed to cover a broad range of nonbodily injury/nonproperty damage liability claims made against the administrators, employees, and staff members of both schools and colleges. ELL, which is also known as "school board legal liability insurance," is a hybrid of traditional directors and officers and errors and omissions coverages. Recommended ELL coverage insures the entity or institution, its trustees, directors, officers, and employees (at the option of the educational institution) against liability arising out of bodily injury, personal injury, and third-party property damage occurring because of wrongful or negligent acts attributable to the institution. Its broad coverage protects against a wide range of potential claims, including but not limited to athletics, alcohol, international studies, campus crime, security guards, transportation of students, sexual molestation, and other sexual misconduct.

For this exposure, use Exhibit 2, for Professional Services, and substitute ELL or equivalent for the Professional Liability insurance.

### **Contracts with Private Parties**

Occasionally, your Entity will enter into contracts with private individuals. A common example may be rental of a facility for private usage, such as a park, meeting hall, or historic building for holding a wedding or other private gathering, or rental of a booth at a community fair. Recreational activity instructors may also be individuals working part-time or as a hobby. As private individuals (and some small nonprofit organizations) do not

normally purchase commercial liability insurance, other forms of financial guarantee may be needed.

Most homeowner insurers will provide additional insured coverage to another party if requested. Thus an individual who purchases a homeowner's policy or tenant's package policy would be able to ask his or her insurance agent to provide the additional insured endorsement. See Exhibit 7 for a set of recommended insurance specifications that allow for homeowner's insurance.

Be aware that most private individuals do not carry large amounts of liability insurance. Unless the homeowner purchases personal umbrella liability coverage, limits on the homeowner's or tenant's package policy are likely to be in the vicinity of \$300,000 to \$500,000. However, the risks involved in a private party event may be just as severe as those in a commercial contract. Crowd exposures and food poisoning are examples.

One possible alternative to endorsement on a homeowner's policy is to require the purchase of Special Event coverage. For those Entities that frequently rent or lease facilities, Special Event coverage may be attractive. Coverage is negotiated by your Entity, and a master policy is issued to your Entity by the insurer. Each tenant applies for and pays the premium on coverage for the special event. The insurer issues a binder for that event only. Coverage applies to the event holder as well as the Entity. The advantage of Special Event coverage is that your Entity can determine coverage and limits. Contact your risk management advisor for information concerning the availability of a Special Events insurance program for your Entity.

### **Instructors**

Many public entities offer a wide variety of recreational classes and programs, from creative writing, to yoga, dance, tennis, and karate lessons. And while many of these activities are considered low risk, many are not. In spite of this, many entities do not practice the contract and insurance recommendations contained in this manual; indeed, many do not require a written contract with instructors. It is recommended that at very least the entity require a written contract containing a scope of work, with a hold harmless in favor of the entity and a waiver of claims against the entity. For high-risk activities and full-time instructors, it is recommended that the entity also require general liability coverage with additional insured protection. Note that coverage for instructors is available for specific classes, similar to special events coverage. See Exhibit 8 for recommended insurance specifications.

### **Special Events & Short Term Rentals**

Public entities also sponsor a wide variety of special events or allow them to be held on their property. For each event not sponsored by the entity, a permit should be issued to a legitimate sponsoring organization that contains a hold harmless and a requirement for general liability insurance naming the entity as an additional insured. Where the sponsoring organization contracts with others to hold the event, the entity should also request proof of insurance and additional insured status from that party. Special event coverage is also available to protect the renter and your agency, including one program offered by Alliant. Ask your insurance advisor or search the Internet for Special Event Coverage for more details.

Exhibit 7 may be used for both short-term rentals of facilities and for outdoor special events. Note that the specifications also address the issue of liquor liability insurance. As a general rule, any person who is in the business of manufacturing, distributing, or selling alcohol must have liquor liability coverage. This includes a caterer who is supplying alcohol or a non-profit selling beer or wine at a street fair to raise money. These entities should also have a permit issued by the local Alcohol Bureau of Control (ABC) board. Otherwise, if the renter is supplying alcohol for no charge, their coverage should include host liquor liability, and most general liability policies do provide such coverage.

### **Other Specialized Professional Liability Insurance**

There are a variety of specialized professional services that may require a unique type of professional liability coverage. The reader is advised to use Exhibit 2 for the insurance specifications but may need to customize the language based on the unique exposure presented. One such exposure is investment banking, and the following is provided as a sample of how to address it in the contract.

#### **Investment Bankers Errors and Omissions Insurance**

At all times during the term of this Agreement, Consultant agrees to maintain Investment Bankers Errors and Omissions Insurance coverage for claims arising from the negligent acts, errors, or omissions for services or operations performed by the Consultant under this Agreement. The Consultant shall ensure both that (1) any policy retroactive date is on or before the date of commencement of the Project; and (2) any policy has a reporting period of at least two years after the date of completion or termination of this Agreement. The Consultant agrees that, for the time period defined above, any changes that reduce coverage will be presented to Entity for review.

### **Garagekeeper's Legal Liability Insurance**

This protects parking lot operators who provide valet parking, car dealers, and garage owners against liability for damage to vehicles in their care, custody, or control. The garagekeeper who accepts another's property for repair or keeping becomes a bailee. The law imposes certain legal responsibilities on a bailee. These responsibilities are normally excluded by general liability policies under the care, custody, and control exclusion. Therefore, this coverage is needed.

### **Marina Operator's Legal Liability Insurance**

This coverage is another form of bailee liability insurance that protects marina operators against liability for damage to boats in their custody. Tenants who berth at the marina are potential claimants for damage to their boat while in its slip.

**Exhibit 7:****INSURANCE REQUIREMENTS FOR RENTAL OF FACILITIES**

Renter shall procure and maintain for the duration of the rental period insurance against claims for injuries to persons or damages to property which may arise from or in connection with the rental of the facilities and the activities of the renter, his guests, agents, representatives, employees, or subcontractors.

**MINIMUM SCOPE AND LIMIT OF INSURANCE**

Coverage shall be at least as broad as Insurance Services Office Form CG 00 01, covering **Commercial General Liability** (CGL) on an “occurrence” basis, including products-completed operations, personal & advertising injury, with limits no less than **\$1,000,000** per occurrence.

**Other Insurance Provisions**

The general liability policy is to contain, or be endorsed to contain, the following provisions:

1. **The Entity, its officers, officials, employees, and volunteers are to be covered as insureds** with respect to liability arising out of liability arising out of the rental of the facility, including work or operations performed by or on behalf of the Renter and materials, parts, or equipment furnished in connection with such work or operations.
2. For any claims related to this project, the **Renter’s insurance coverage shall be primary** insurance as respects the ENTITY and any insurance or self-insurance maintained by the ENTITY shall be excess of the Renter’s insurance and shall not contribute with it.
3. The Insurance Company agrees to **waive all rights of subrogation** against the ENTITY for losses paid under the terms of any policy covering the facility rental or any activities of the Renter, his guests, agents, representatives, employees or subcontractors.

***Acceptability of Insurers***

Insurance is to be placed with insurers with a current A.M. Best’s rating of no less than A:VII, unless otherwise acceptable to the Entity.

***Verification of Coverage***

Renter shall furnish the Entity with original certificates and amendatory endorsements effecting coverage required by this clause. All certificates and endorsements are to be received and approved by the Entity *at least five days* before Renter commences activities.

***Liquor Liability***

If Renter will be supplying alcoholic beverages, the general liability insurance shall include host liquor liability coverage. If Renter is using a caterer or other vendor to supply alcohol that vendor must have liquor liability coverage. If Renter intends to sell alcohol either the Renter or vendor providing the alcohol for sale must have a valid liquor sales license and liquor liability insurance covering the sale of alcohol.

**Homeowners Insurance**

In some cases the Renter's homeowner's liability insurance may provide coverage sufficient to meet these requirements. Renter should provide these requirements to his or her agent to confirm and provide verification to the Entity.

**Special Events Coverage**

Special events coverage is available for an additional fee to provide the liability insurance required by this agreement. Renter can obtain additional information and cost from Entity.

**Special Risks or Circumstances**

Entity reserves the right to modify these requirements based on the nature of the risk, prior events, insurance coverage, or other special circumstances.